86-2043

No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL,

Respondent.

PETITION ON BEHALF OF NEW YORK TELEPHONE COMPANY AND CENTRAL HUDSON GAS & ELECTRIC CORPORATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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27 pp

Question Presented

Petitioners are the Public Service Commission of the State of New York, and two privately-owned utility companies in New York State. The utility companies initiate rates that include charitable contributions as operating expenses, and the rates accepted by the Commission are based on operating expenses which include a portion of these contributions. Respondent, a customer of the utility companies, brought an action in the state courts seeking a declaration that the rates, insofar as they are based on charitable contributions, are invalid, on the ground that his First Amendment rights are violated in that some recipients of the contributions are institutions which expound beliefs and support causes which are repugnant to respondent's beliefs and practices. The utilities and the Commission moved to dismiss the complaint for failure to state a cause of action. The question presented is:

Whether the respondent has alleged facts constituting the state action necessary to ground a cause of action for violation of the First and Fourteenth Amendments to the Constitution of the United States?

List of Parties

The parties to the proceeding below were petitioners Public Service Commission of the State of New York, New York Telephone Company and Central Hudson Gas & Electric Corporation and respondent Joseph Cahill. In addition, Paul L. Gioia, Edward P. Larkin, Carmel C. Marr, Harold A. Jerry, Jr., Anne F. Mead and Rosemary S. Pooler, all of whom are current or former members of the Commission, were appellants below and are petitioners herein. The Commission and its current or former members are concurrently filing a separate petition for certiorari.

Rule 28.1 Listings

The parent corporation of New York Telephone Company is NYNEX Corporation. The subsidiaries of New York Telephone Company are NYNEX Service Company and Empire City Subway Company. The affiliates of New York Telephone Company are NYNEX Business Information Systems Company, NYNEX Credit Company, NYNEX Development Company, NYNEX Information Resources Company, NYNEX Material Enterprises Company, NYNEX Mobile Communications Company, NYNEX Properties Company and New England Telephone Company.

Central Hudson Gas & Electric Corporation has no parent corporation. Its subsidiaries are Central Hudson Cogeneration, Inc., Central Hudson Enterprises Corporation, CH Resources, Inc., Greene Point Development Corporation and Phoenix Development Corporation. Central Hudson Gas & Electric Corporation's affiliate is Thunder Hill Wind Power Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Rule

Miscellaneous

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New York Telephone Company and Central Hudson Gas & Electric Corporation petition this Court to issue a writ of certiorari to the Court of Appeals of the State of New York to review the decision and judgment in *Cahill* v. *Public Service Commission*, 69 N.Y.2d 265 (1986), *mot. for rearg. denied* — N.Y.2d — (1987).

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 69 N.Y.2d 265, — N.E.2d —, 513 N.Y.S. 2d 656 and is reprinted at App. A1-A19. The order of the Court of Appeals denying the motions for reargument and clarification is not yet reported and is reprinted at App. A20. The opinion of the Supreme Court

of the State of New York, Appellate Division, Third Department, is reported at 113 A.D.2d 603, 498 N.Y.S.2d 499 and is reprinted at App. A21-A29. The opinion of the Supreme Court of the State of New York, Special Term-Albany County, is reported at 128 Misc. 2d 510, 490 N.Y.S.2d 90 and is reprinted at App. A30-A35.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on December 19, 1986. Timely motions for reargument and clarification of that decision were made, and were denied by order issued and entered on March 24, 1987. This Court has jurisdiction under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions and Regulatory Decisions Involved

The pertinent constitutional and statutory provisions and excerpts from relevant decisions of the Public Service Commission of the State of New York are reprinted at App. A36-47.

Statement of the Case

New York Telephone Company ("New York Telephone") is a privately-owned corporation which provides telephone and other communication services to over 6,000,000 customers throughout New York State. Central Hudson Gas & Electric Corporation ("Central Hudson") is a privately-owned corporation which provides electric and gas service to approximately 230,000 customers in the mid-Hudson River region of New York State. Like other private

corporations, petitioner utilities charge prices which are intended to defray the normal costs of running a business in today's society, including the costs of contributions to charities.[1]

With the enactment of the New York Public Service Law in the early 1900's a system of regulatory oversight became applicable to petitioner utilities. Under that statute, petitioner Public Service Commission of the State of New York ("Commission") is given the responsibility to review rate changes that are filed by a utility (*see* Public Service Law Section 66(12), 92(2) (McKinney 1955 and 1987 Supplement)). Following its review (accompanied by such hearings as are provided for by the Public Service Law), the Commission may accept the rates, it may disapprove them (and allow the corporation to file revised rates), or it may do nothing in which event the filed rates become effective (*see* Public Service Law Section 66(12), 72, 92(2) and 97 (McKinney 1955 and 1987 Supplement)).

In 1983, New York Telephone filed tariffs with the Commission which set out revisions to its rates and charges. The rates were based on the corporation's intrastate cost of doing business including, insofar as relevant here, some $4.5 million for charitable contributions. In response to this rate proposal, the Commission instituted formal hearings.

On June 22, 1984, the Commission issued its decision rejecting the revised rates, but permitting New York Telephone to implement other rates at a lower level than sought by it. Insofar as charitable contributions are concerned, the Commission allowed New York Telephone to include only $2.1 million of the corporation's $4.5 million costs in cal-

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[1] No question has been raised in this case as to the propriety of corporate charitable contributions as appropriate business expenses in today's society.

culating rates. (App. A73.) The Commission's decision reflected a practice which the Commission has followed since 1970. In that year, the Commission agreed with New York Telephone's position that charitable contributions are a reasonable operating expense upon which rates can be based. (App. A45-A47.) Pursuant to the Commission's practice, the level of charitable contributions included in operating expenses since 1970 has been limited to the amount utilities gave to charities in 1969, adjusted for inflation, regardless of the higher amounts the utilities currently are giving to charities. The Commission's 1984 decision in the New York Telephone case reflected this rate limitation.

The Commission's practice regarding utility charitable contributions was described, as follows, in the affidavit of its Counsel in support of its motion filed in the trial court to dismiss respondent Cahill's petition:

> New York State utilities have made charitable contributions for many years. Charitable contributions are considered a legitimate cost of doing business and, therefore, constitute a proper ratemaking expense. (App. A55.)
>
> The Commission . . . has never *ordered* utilities to make charitable contributions generally or religious contributions specifically. While it has allowed charitable contribution expenses to be included in estimates of utility expenses, the Commission has never interfered with the utilities' selection of donees. (App. A55-A56, emphasis in original.)
>
> The Commission . . . does not intrude upon the utilities' discretion in making contributions. The utilities select which organizations shall receive contributions and the amount of each contribution. The utilities may choose to make no contributions or contributions in excess of the amount allowed in rates. (App. A56.)

On October 19, 1984, Joseph Cahill, a customer of New York Telephone, filed a petition in the Supreme Court of the State of New York, Albany County, commencing a proceeding against the Commission to have the Commission's 1984 determination invalidated on the grounds that it violated his rights under the First Amendment of the United States Constitution. (App. A48-A52.) New York Telephone was added as a necessary party. Central Hudson was allowed to intervene because Mr. Cahill is a customer of Central Hudson, and Central Hudson's rates for electric and gas service are also calculated on a cost of service which includes a portion of Central Hudson's charitable contributions in operating expenses.

The Commission, New York Telephone and Central Hudson moved to dismiss the petition on the grounds that it failed to allege sufficient state action to support a cause of action under the First Amendment of the United States Constitution as applied through the Fourteenth Amendment. (App. A54-A82.) The Supreme Court of the State of New York, Special Term—Albany County, found that Mr. Cahill's petition alleged sufficient state action to sustain a challenge under the First Amendment and denied the motions to dismiss.

The Commission, New York Telephone and Central Hudson appealed the lower court's denial of their motions to dismiss to the Appellate Division, Third Department. In a 3 to 2 decision, the Appellate Division sustained the lower court.

Leave to appeal to the Court of Appeals of the State of New York was granted. By opinion dated December 19, 1986, a majority of the Court of Appeals sustained the denial of the motions to dismiss. The majority of the Court of Appeals held that the exercise of the Commission's

ratesetting authority combined with the state's grant of a monopoly franchise to the utility constituted sufficient state action to support an action under the First Amendment. Judge Hancock, writing for the majority in the Court of Appeals, found that the level of involvement necessary to find state action "results from the fact that the State establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service." (App. A6.) Judge Titone, dissenting (joined by Chief Judge Wachtler), concluded that respondent had not demonstrated a nexus between the state and the private action sufficient to support a finding of state action. Judge Titone stated that the majority's position that the state's ratesetting authority combined with the grant of a monopoly franchise constituted sufficient state action had been rejected by this Court in *Jackson* v. *Metropolitan Edison, infra.* He concluded: "if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they may choose to make. By allowing these utilities to engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no State involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision." (App. A16-A17, footnotes deleted.)

The Commission, New York Telephone and Central Hudson filed motions for reargument or modification of the Court of Appeal's decision which were denied by order issued and entered on March 24, 1987. (App. A20.)

Reasons for Granting the Writ

From our statement of the case it is apparent that the inclusion of charitable contributions in the cost of service was initiated by petitioner New York Telephone Company, that the Commission accepted the rates of New York Telephone, subject to limitations in amount, and that this acceptance left New York Telephone free to determine for itself whether or not to continue such contributions, to what institutions they would be made, and in what quantity they would be distributed. On the basis of these undisputed facts we think it clear that, under the decisions of this Court, respondent Cahill has not made out a case of state action. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Flagg Brothers* v. *Brooks*, 436 U.S. 149 (1978). We will discuss this issue more fully, but we will first establish the other reasons why this Court should grant the petition for certiorari.

1. *The New York Court of Appeals, by finding that the alleged facts comprised the state action necessary to ground a cause of action under the Fourteenth Amendment, has established federal constitutional law in New York State which is in conflict with the applicable federal law as declared by this Court and which expands the scope of the state action doctrine.* Until the decision in this case, the New York State law on state action was in harmony with this Court's decisions, such as the *Jackson* and *Blum* cases. *Montalvo* v. *Consolidated Edison Co.*, 92 A.D.2d 389, 394 (1st Dept. 1983) ("The mere fact that a State permits an action while not compelling it, is insufficient . . . to convert otherwise private action into State action," citing the *Jackson* and *Flagg Bros.* cases), *aff'd on the opinion below*, 61 N.Y.2d 810 (1984); see also *Taylor* v. *Consolidated Edison*

Co., 552 F.2d 39 (2d Cir. 1977), *cert. denied*, 434 U.S. 845 (1977); *Karp* v. *Consolidated Edison Co.*, Sup. Ct. N.Y. County (1984). (App. A64-A68.)

But in the present case the New York court rejected the authority of *Jackson* and relied instead on *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). The New York court explained (App. A4-A6):

> The critical issue is whether petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the state has merely acquiesced . . . or governmental conduct of an agency of the State itself. Because it involves the latter we hold that under the governing authority of *Abood* . . . the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution. . .
>
> * * * *
>
> There is no basis for distinguishing *Abood*. The acts giving rise to the claims here and in *Abood* were not the private decisions . . . to make charitable and political contributions but the governmental actions in compelling the utility customers here and the nonunion teachers in *Abood* to pay for them.

This reliance on *Abood* was, of course, misplaced for there was *no* state action issue in *Abood*. In that case, the defendant Detroit Board of Education, a governmental entity, entered into an "agency shop" agreement with a union of its employees as permitted by a state statute. The plaintiffs were nonunion Board employees who objected to the union's use of their service fees which they were required to pay to the union under the agency shop agreement. As the Court repeatedly stated, the entire matter was in the governmental sector; there was no occasion to discuss state action, since it was obviously present on all sides.

The opinion and decision of the New York court, based as it is on this erroneous use of the *Abood* case, is binding federal law in the lower courts of New York State.[2] The situation is much the worse, however, because of the basis upon which the New York court rejected the authority of the *Jackson* case, relied on by the dissenting judges. The majority opinion first attacks the dissenters for overlooking "the utility's distinguishing characteristic as a legalized monopoly" subject to "public control," and for indulging "the fallacy of comparing a public utility with a private company because of the utility's unique public character . . . " (App. A7). True it is that "public utilities" are far more "public" than unregulated enterprises. But this very argument was urged in the *Jackson* case as the ground for treating the utility's action in cutting off the plaintiff's service as "state action" for constitutional purposes, and was flatly rejected; regulated monopolies the utilities may be,[3] but they remain private corporations, and their actions are not in themselves state action. 419 U.S. 350-51, 358-59.

Furthermore, the New York court distinguished the *Jackson* case on the ground that there "the suit was against the utility and not the Pennsylvania Utility Commission" (App. A8). It is hard to take this point seriously; surely the issue turns on the degree and type of Commission involvement in the utility company's actions, not on the entity that the plaintiff selects as its litigation target.[4]

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[2] Presumably the federal courts in New York State will continue to apply the federal law in accordance with this Court's decisions. *Taylor* v. *Consolidated Edison Co., supra.*

[3] It should be noted that others have been permitted to compete in what were formerly monopoly markets; however, for purposes of this appeal, petitioner utilities do not contest the characterization of regulated utilities as monopolies.

[4] This point was crisply made by the dissenting judges in the New York court (App. A12 fn 2).

The New York court also distinguished *Jackson* on the ground that it dealt "solely [with] the private act of the utility" (App. A8). Contrary to the New York court's reading, more than the "private act" of a utility was at issue in *Jackson;* the question there, as here, was whether approval of a tariff provision of a heavily regulated utility constitutes state action.

The reasons relied on by the New York court, as well as the decision, will be looked to by the lower New York courts in future cases. The fact that public utilities are regulated and in many respects monopolies, and the circumstance that an aggrieved plaintiff sues a state entity rather than the immediate offender, may now be used to expand the applicable scope of the Fourteenth Amendment in New York State. To embrace such an approach to the state action concept is bound to push its limits far beyond its present borders, and constitutionalize many disputes which now are settled by other and more local means.

Some governmental involvement exists in all cases where state action is alleged. But whether the offending activity is, at its root, private or whether the State can be held responsible for the offending activity requires a careful examination of the particular facts involved, and the "essential dichotomy" between private and governmental action should be maintained. *Jackson,* 419 U.S. at 345. The decision of the New York court is likely to have impact elsewhere. Virtually all the states in this country have regulatory schemes that parallel the New York scheme. Moreover, the impact of the decision of the New York court would be felt not just in the utility sector, but in other areas subject to state regulation. If the review, consent or approval by the regulatory agency of utility-initiated action is deemed to be state action, then federal constitutional issues could be expected to erupt in courts throughout the nation. This

would be especially ironic since regulatory agencies were created for the very reason that court or legislative review of specific utility action proved to be unworkable.

The charitable contributions at issue in this case are but one of many costs that could be the subject of constitutional challenges if the actions of regulated private utilities are deemed to be actions of the government via the ratemaking process. Can rates include the cost of utility-provided health plans for employees if those health plans cover abortions? Can Christian Scientists object to rates that reflect the cost of any surgery? Can ratepayers who are Sabbath-observers claim that their First Amendment rights are infringed by rates which include payments for work done on the Sabbath? Moreover, regulation of private utilities involves the state in much more than the rate process. Utilities must obtain agency approval of activities which other businesses engage in freely (e.g., construction of facilities, issuance of corporate securities, corporate reorganization, sales of assets) all of which could generate a substantial number of lawsuits based on constitutional issues.

If, as the New York Court of Appeals has indicated, the actions of regulated businesses are deemed to be those of the government, then extra burdens which the judiciary is ill-equipped to handle will be thrust upon the courts. Whether constitutional law is to move in such a direction is certainly an issue worthy of this Court's review.

2. *The state action requirement, and the use the New York court has made of the Abood case, continue to present important questions of federal constitutional law which are dividing the judges in the state and lower federal courts.* The present case is a good example. The identical state action question raised here came before a different lower New York state court, which found state action lacking. *Karp* v. *Consolidated Edison Co., supra.* In the present case

the judges divided in both appellate courts. In a contemporaneous and very comparable case in the Eleventh Circuit, the court held that state action was lacking, relying on the *Jackson, Lugar,* and *Blum* cases—the very ones that the New York court rejected as authority in the present case. *Carlin Communication, Inc.* v. *Southern Bell Telephone,* 802 F.2d 1352 (1986).

This Court has recently granted certiorari in *Communications Workers* v. *Beck,* No. 86-637, *cert. granted* June 1, 1987, 55 L.W. 3803. This case, involving problems under the National Labor Relations Act, also embraced a First Amendment claim, which raised the state action issue. 776 F.2d 1187, *en banc* hearing 800 F.2d 1280 (4th Cir. 1986). The ten judges *en banc* were divided among two who would find state action based upon *Abood,* five who thought there was none, and three who found no reason to decide the issue. In two other cases in the labor field, the circuit courts have declined to invoke the *Abood* case to resolve state action problems. *Kolinske* v. *Lubbers,* 712 F.2d 471, 476 (D.C. Cir. 1983), and *Price* v. *International Union,* 795 F.2d 1128, 1133 (2d Cir. 1986).

A grant of certiorari in this case will not only provide obviously necessary guidance to federal and state courts as to the relevance of the *Abood* case to state action. It will also provide guidance in all instances in which the state authorizes business practices by private parties which allegedly infringe the First and Fourteenth Amendment rights of others. Such questions are bound to recur, not only in the labor and utility ratemaking fields, as such cases as *Blum* have already shown.

3. *The state action issue is separate from and independent of other issues in this case, and should be decided proximately to avoid unnecessary judicial consideration of complicated questions under the First and Fourteenth*

Amendments which the New York court's affirmative decision on state action presents. The New York court decided only that the motions to dismiss respondent's petition, for lack of state action, should be denied. If that decision stands, the case will be remanded to the Supreme Court, Albany County, for hearing on the merits of respondent's claim.

That claim is explicitly based "solely on the ground that it violates his First Amendment rights of free expression, free exercise of religion and against establishment of religion" (App. A48). It is bound to raise presently unresolved federal constitutional issues of considerable complexity.

The basis upon which the petitioner utilities have included the costs of charitable contributions in their rate initiatives is that such contributions are legitimate operating expenses. If that is established, are customers paying for services rendered to them, or are they contributing to the items of expense which support these services? [5] Under either interpretation, does the respondent have any constitutional basis for objecting to the contributions in general, or to select particular contributions as obnoxious? [6] Is the status of a utility customer such as to raise any inference that the cus-

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[5] This Court in *Bd. of Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926) observed that "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company." *Also see Pacific Gas & Electric Co.* v. *Public Utilities Comm.*, — U.S. —, 106 S.Ct. at 915 fn 1 (Marshall, J. concurring (1986)).

[6] Respondent's petition is not clear on this point. In paragraph 7 of the petition he "objects as a matter of principle to being compelled to support these charities in particular, and all charities in general. . . ." But the only damage he asserts relates to particular (though un-named) charities that offend him on "moral and religious" or "personal or political" grounds, such as hospitals at which abortions may be performed. (App. A50.)

tomer approves the utility's contribution to a particular beneficiary?

In the *Abood* case this Court found no constitutional objection to requiring the nonunion teachers to pay the union for normal union activities (for example, collective bargaining and grievances) whether the individual teachers approved or disapproved them, but upheld their objections to "ideological activities unrelated to collective bargaining." 431 U.S. at 236. Should and could a similar line be drawn if the present case should go to hearing? If so should the disapproved contributions be only those remote from "legitimate operating expenses" or eliminated for other reasons?

Surely it would be poor economy to require the courts in this case, and no doubt in others, to tangle with these awkward and perhaps intractable issues if, as we believe is plain, the lack of state action stands in the way of their jurisdiction to penetrate what the late Justice Harlan would have called "the thicket of discussion". *Baker* v. *Carr,* 369 U.S. 186, 330 (1962). Further, the prospect of such complex litigation suggests the possibility that the litigants in this case might at some stage terminate the litigation, and leave these issues unresolved or mooted, so that the state action issue, if not proximately resolved, would remain where the New York court has left it.[7] This would leave litigants in New York facing, perhaps for years, conflicting

[7] Moreover, on remand, should petitioners prevail on the merits and Mr. Cahill not appeal, the petitioners would be foreclosed from bringing the state action issue back up through the State courts. The applicable New York statute provides that a party who ultimately prevails cannot appeal a preliminary determination which may have been adverse because that party is not aggrieved by the final judgment. CPLR Section 5511 (McKinney 1978); *Parochial Bus System, Inc.* v. *Bd. of Education,* 60 N.Y.2d 539, 544-45 (1983); *see* Weinstein-Korn-Miller, *New York Civil Practice,* Volume 7, Paragraph 5511.06 (Matthew Bender 1987); *compare* CPLR Section 5501 (a)(1) (McKinney 1978).

federal law applied in state and federal courts. There is abundant authority for this Court to proceed now with the state action issue, so as to prevent such an unhelpful denouement. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *North Dakota Pharmacy Board* v. *Snyder's Drug Stores*, 414 U.S. 156, 159-64 (1973); *California* v. *Stewart*, 384 U.S. 436, 498 n.71 (1966); Stern, Gressman, and Shapiro, *Supreme Court Practice* 6th Ed., pp. 128-36 (1986).[8]

4. *The decision of the New York court is wholly inconsistent with the state action decisions of this Court, and should be reversed and the case ordered dismissed.* The New York court got off on the wrong foot in the very first sentence of its consideration of the state action issue (App. A4): "The critical issue is whether petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the state has merely acquiesced, as respondents and the dissenters contend, or governmental conduct of the state itself." Obviously, as the Court then stated "it involves the latter," but it did not involve *only* the latter. The undeniable fact that the proceeding *included* governmental action (which the New York court at once found dispositive on the mistaken authority of *Abood*) is only the beginning of the question. The proceeding was replete with

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[8] Justice White's opinion in the *Cox* case contains a full discussion of the subject. His opinion in the *Mercantile National Bank* case contains the following (371 U.S. at 558):

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe it serves the policy underlying the requirement of finality . . . to determine now in what state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceeding.

action by the private utility and the "critical issue" is whether there is a sufficient nexus between the proceeding and the regulated entity's action so that what happens may be deemed action of the government.

That is the issue to which this Court directed its attention in the *Jackson* case, and in the three cases decided in 1982,[9] which were analogous insofar as in each case the state had authorized actions by private parties, and it was the private parties' acts which triggered the controversies.

In the *Jackson* case, as here, the plaintiff relied heavily on the circumstance that the private utility's action (termination of service in the event of non-payment) had been set forth in a proposed rate structure which the utility had filed with the regulatory body. The Court's comments (by then Justice Rehnquist) are germane to the present case (419 U.S. at 357):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

In the *Blum* case, patients in a nursing-home, funded and heavily regulated by the state, complained that the level of

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[9] The cases are *Blum, supra; Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, and *Rendell-Baker* v. *Kohn*, 457 U.S. 830.

their care had been down-graded by a committee of doctors appointed to monitor and to assess the patients' needs. This Court held that these decisions did not constitute state action, saying (457 U.S. at 1004-05):

> . . . although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.

In the present case, it is plain that the Commission's approval of a portion of New York Telephone's charitable contributions as normal business expenses was acquiescence and not initiative. The rate change of New York Telephone Company in 1970 was the initiative which opened the matter before the Commission. (App. A45-A47.) Its approval of the rate change, subject to quantitative limitations, was not a mandate to New York Telephone in particular, or utilities in general, either to make contributions or to include these contributions in operating expenses upon which rates are based. Complete discretion was left to the utilities with respect to whether they should make contributions, the selection of recipients, amount of contributions, and all other such matters of choice (App. A55-A56).

The minority in the New York court was correct in stating that *Jackson* requires a state action analysis which "subtract[s] the government from the equation and then consider[s] what the behavior of the private entity would be without any governmental intervention at all." (App. A16.)

This type of analysis is intended to determine whether the actions of the private entity would have been carried out in the absence of the state or whether the state could be said to have coerced, or encouraged actions that would not otherwise have occurred. Only in the latter instance can state action be present. *Jackson*, 419 U.S. at 357; *Blum*, 457 U.S. at 1004-05; *Flagg Brothers*, 436 U.S. at 164. Here, as recognized by the minority in the New York court, in the absence of the regulatory system (App. A16):

> . . . utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable contributions they might choose to make. . . .

The decision of the New York court can be contrasted with the Eleventh Circuit's decision in *Carlin Communication, Inc.* v. *Southern Bell Telephone*, 802 F.2d 1352 (11th Cir. 1986). In *Carlin*, the plaintiff, a business which subscribed to a service of a telephone company under which the business provides a pre-recorded message which members of the public may hear when the subscriber's number is called, claimed that a provision in the telephone company's tariff which permitted the telephone company to exclude sexually explicit messages violated the subscriber's First and Fourteenth Amendment rights to freedom of speech. The court found a lack of state action despite the fact that the state agency had issued an "order strongly approving" the tariff at issue. 802 F.2d at 1358. The Eleventh Circuit cited *Jackson* for the premise that "the mere approval by the PSC of a business practice of the regulated utility does not 'transmute a practice initiated by the utility' into state action." 802 F.2d at 1361.

The telephone company in *Carlin*, like the petitioner utilities in the present case, is a heavily regulated utility whose tariffs are subject to regulatory review and approval. The

subscriber in *Carlin*, like the respondent herein, had no practical alternative to taking service pursuant to the terms of the utility's tariff. Thus, both the subscriber in *Carlin* and respondent herein face the same coercion, *i.e.*, compliance with the terms of a utility's tariff as a condition to obtaining service. Despite these similarities, the *Carlin* court and the New York court reached different results on the state action question.

The decision of the New York court in the instant case significantly expands the basis upon which private entities can be held to constitutional standards applicable to governmental bodies. In turn, the decision also markedly widens the basis upon which the governmental bodies which deal with these private entities can be held responsible for private business decisions.[10]

The distinction between private and governmental action is of profound significance under our system of law. As this Court recently noted in *Lugar*, 457 U.S. at 936:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial powers. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

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[10] See the Solicitor General's comment at page 29 of his brief *amicus* for the United States in *Communications Workers* v. *Beck*, *supra*: "Treating Congress's decision *not* to prohibit particular conduct as a basis for finding 'governmental action' would . . . subject private actors to constitutional restraints that are not designed to restrain them at all." (Emphasis in original.)

The decision of the New York court, we submit, erroneously fails "to respect the limits" of the powers of the New York courts as directed against governmental and private interests.

Conclusion

For the reasons stated, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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June 22, 1987

86-2043 86-2044

No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL,

Respondent.

APPENDIX TO PETITION

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84 pp

TABLE OF CONTENTS

APPENDIX

Opinion of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

Argued November 12, 1986; decided Decmber 19, 1986

In the Matter of

JOSEPH CAHILL,

Respondent,

v

PUBLIC SERVICE COMMISSION et al.,

Appellants,

and

CENTRAL HUDSON GAS AND ELECTRIC CORPORATION,

Intervenor-Appellant.

SUMMARY

APPEALS, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered February 7, 1986, which affirmed an order of the Supreme Court at Special Term (Lawrence E. Kahn, J.; opn 128 Misc 2d 510), entered in Albany County in a proceeding pursuant to CPLR article 78, denying motions by respondents to dismiss the petition. The following question was certified by the Appellate Division: "Did this court err, as a matter of law, in affirming Special Term's order which denied respondents' motions to dismiss the petition?"

Opinion of the Court of Appeals

Matter of Cahill v *Public Serv. Commn.*, 113 AD2d 603, affirmed.

OPINION OF THE COURT

HANCOCK, JR., J.

We hold that acts of the New York State Public Service Commission (PSC) in setting rates which compel a utility customer to pay for charitable contributions made by the utility constitute governmental conduct giving rise to a cognizable claim by that customer that his rights under the First Amendment of the United States Constitution have been violated.

I

In a CPLR article 78 proceeding against the PSC and New York Telephone Company (New York Tel.), petitioner, a customer of New York Tel., seeks to annul two actions of the PSC:

(1) The policy adopted by the PSC in 1970 whereby charitable contributions by utilities are allowed as "proper operating expenses" (*New York Tel. Co.*, case 25155, 10 NY PSC 345, 378, 84 PUR3d 321, 349 [July 1, 1970])[1] and

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[1] Prior to 1970 the PSC refused to allow inclusion of charitable contributions as operating expenses on the grounds that they were "not necessary to the conduct of business and that they [were] made at the sole discretion of Company officers to donees of their choosing." (*New York Tel. Co.*, case 25155 [July 1, 1970], at p. 378.) The 1970 policy allows charitable contributions as "proper operating expenses" provided they are "not excessive in total" and that the donations are not irrelevant to the "civic responsibilities" of the utilities. Future allowances are to be measured from pre-1970 contribution levels.

(2) The PSC "Opinion and Order Determining Revenue Requirement and Rate Structure" dated June 22, 1984 (opinion No. 84-16) specifically authorizing, New York Tel. to charge its ratepayers, including petitioner, for charitable donations of approximately $3,000,000 in 1984, and establishing rates to be paid by customers for service which are based on the inclusion of these contributions as operating costs.

Petitioner, a Catholic, alleges that as a consequence of the PSC policy and rate order he is compelled to contribute to "religious institutions" espousing beliefs inconsistent with his own, to charities supporting "the right to an abortion" contrary to his "moral and religious" beliefs and to causes which he finds objectionable on "personal and political grounds". "No matter how small a portion of his bill is affected", he says, he opposes these contributions "as a matter of principle" and he asserts that the PSC has denied him his constitutional rights under the free speech, free exercise and establishment clauses of the First Amendment of the Federal Constitution, citing *Abood v Detroit Bd. of Educ.* (431 US 209).

In lieu of answering the petition, respondents [2] moved to dismiss (CPLR 7804 [f]; 3211 [a] [7]) contending, among other things, that the utilities' actions in passing along the cost of charitable contributions were essentially private decisions and that the government's limited involvement was an insufficient basis for finding a violation of petitioner's First Amendment rights, citing *Jackson v Metropolittan Edison Co.* (419 US 345) and *Blum v Yaretsky* (457 US 991). Special Term rejected respondents' argu-

[2] Central Hudson Gas and Electric Corporation, which supplies electricity to petitioner, was granted permission to intervene in this proceeding, and joined in the PSC's motion to dismission the petition.

ments (128 Misc 2d 510) and the Appellate Division, with a divided court, affirmed, holding that petitioner had adequately stated a "threshold claim of 'State action'" by "alleging that the PSC adopted a policy which permitted the costs of charitable donations to be passed along to ratepayers" (113 AD2d 603, 606). The dissenters found that this case fell "squarely under" *Blum* and *Jackson* and that petitioner had failed to allege a sufficient nexus between the challenged acts and the State (*id.*, at p 609).

The Appellate Division granted respondents permission to appeal to our court and certified the following question: "Did this court err, as a matter of law, in affirming Special Term's order which denied respondents' motions to dismiss the petition?" For reasons which will appear, we hold that the question should be answered in the negative and that the order of the Appellate Division affirmed.

II

The critical issue is whether the petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the State has merely acquiesced, as respondents and the dissenters contend, or governmental conduct of an agency of the State itself. Because it involves the latter we hold that under the controlling authority of *Abood v Detroit Bd. of Educ.* (431 US 209, *supra*) the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution. In *Abood*, plaintiffs, nonunion teachers, challenged the validity of a union shop clause in the collective bargaining agreement between their employer and the teachers' union because dues they were compelled to pay were being used by the union for legislative lobbing and for the

support of political candidates. The Supreme Court, in holding that plaintiffs' rights were infringed by being forced to pay a portion of these contributions under threat of loss of their jobs, stated (at pp 235-236):

"[T]he freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd. of Ed.* v. *Barnette,* 319 U.S. 624, 642.

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins,* 367 U.S. 488, or to associate with a political party, *Elrod* v. *Burns, supra;* see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment.

* * *

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. *Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.*" (Emphasis added.)

There is no basis for distinguishing *Abood.* The acts giving rise to the claims here and in *Abood* were not the private decisions of the utilities and the union to make charitable and political contributions but the governmental actions in compelling the utility customer here and the non-

union teachers in *Abood* to pay for them. In *Abood* the coercion came from the State-sanctioned union shop clause under which nonunion members could be discharged for nonpayment. In this proceeding, the coercion results from the fact that the State establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.

The dissent points to no difference between the coercive effect of the PSC rate directives and the coercive effect of the union shop clause in *Abood*. Instead, for purposes of its argument, it constructs a model of a utility which omits the utility's distinguishing characteristic as a legalized monopoly—public control. The dissent then analyzes the utility's behavior "without any governmental intervention at all" (dissenting opn, at pp. 278-279) as though it were a private company and readily concludes that "utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make", and that "the PSC has done no more than merely refuse to interfere with what is essentially a private decision." (Dissenting op, at p 279). To reach these conclusions, it must be emphasized, the dissent has assumed the validity of two propositions: that "the regulatory powers of the State [are] not involved in the rate-setting process" (dissenting opn, at p 279) and that the charitable contributions reflected in the rates are "charges in which the PSC has, in the truest sense of the word, merely 'acquiesced' " (dissenting opn, at p 278). But these assumptions find no support in law or fact.

A public utility is franchised by the State (Public Service Law §§ 68, 99) to provide services to the public at just

and reasonable rates (Public Service Law §§ 65, 91) in exchange for a proper return on its investment (*see*, Public Service Law § 97; *Matter of Village of Boonville v Maltbie*, 272 NY 40). Operating as a monopoly (*see, People ex rel. New York Edison Co. v Willcox*, 207 NY 86, 93-94), it is subject to regulation by the PSC (Public Service Law §§ 66, 94). The PSC oversees the utilities for the public good as an exercise of the State's police powers (*People ex rel. New York Elec. Lines Co. v Squire*, 145 US 175) and has exclusive authority to determine just and reasonable rates (Public Service Law §§ 66; [12]; § 92 [2]). It establishes maximum rates which may not be exceeded (Public Service Law § 65 [1]; § 91 [1]). In fact, no utility may charge more or less than the rates established by the PSC (see, Public Service Law § 66 [12]; § 92 [2]).

Aside from the fallacy of comparing a public utility to a private company because of the utility's uniquely public character, the analogy which the dissent draws to the decisions of corporate officials of a private company in making charitable contributions (dissenting opn, at p 279) cannot stand for a more basic reason. What is at issue here is *not the conduct* of the utility officials, but the policy and directives of the PSC in establishing utility rates which include charitable contributions as operating expenses. And in any event the effect of a decision of a private corporation to pass through to its customers the costs of charitable contributions simply cannot be compared with the action of the PSC in setting utility rates which include such contributions. In the case of a private corporation a customer who disapproves has a voice—he may decide not to buy the product. In the case of a utility the customer has no voice —the contribution is locked into the rate approved by the PSC, and the customer must pay or go without service.

For the same basic reason—that this proceeding challenges the public conduct fo the PSC and not the private conduct of the utilities—*Jackson v Metropolitan Edison Co.* (419 US 345, *supra*) and *Blum v Yaretsky* (457 US 991, *supra*) are inapplicable. In *Jackson* the suit was against the utility and not the Pennsylvania Utility Commission. The basis of the lawsuit was solely the private act of the utility in shutting off electric service, and the court simply dismissed plaintiff's arguments that that private conduct should be attributed to the State merely because of its role in regulating the utility and in approving the regulations under which the termination was effected. Similarly, in *Blum* the actions which the nursing home patients sought to attribute to the State were decisions made by "utilization review committees" of private nursing homes to transfer patients to facilities providing less intensive medical care. The court held that these committee decisions did not become State action solely because the nursing homes were subject to State regulation and the State responded to the decisions by adjusting the patients' Medicaid benefits.

To bring the case within *Jackson* and *Blum,* the dissent, referring to the PSC's brief (dissenting opn, at p 278), minimizes the function of the PSC in rate setting and characterizes its role as little more than passive acquiescence. Such a narrow view of the PSC's function, as already noted, is at odds with the broad grant of rate-setting authority vested in the PSC by the Legislature (Public Service Law §§ 66, 72, 91). It also runs counter to our own decisions holding that the function of rate setting is left to the discretion of the Public Service Commission, and that so long as rates are just and reasonable, they may not be set aside (*see, Matter of Abrams v Public Serv. Commn.*, 67 NY2d 205, 211-212; *Matter of New York State Council of Retail Merchants v Public Serv. Commn.*, 45 NY2d 661).

As to petitioner, a customer who must purchase service from a public utility at rates established by the State, the combined effect of the utility's monopoly status and the rate order is no less coercive than the threat of employment loss in *Abood*.[3] Like plaintiffs, who had a right to hold their jobs in *Abood*, petitioner, a member of the public in the utility's franchised area, has an unquestioned legal right to utility service (Public Service Law §§ 65, 91). Like the plaintiffs in *Abood*, he must forego that right or be subject to the "compulsory subsidization of ideological activity" condemned in *Abood* (431 US, at p 237) and its progeny (*see, Chicago Teachers Union v Hudson*, 475 US —, 106 S Ct 1066; *Ellis v Railway Clerks*, 466 US 435; *Galda v Bloustein*, 686 F2d 159). That petitioner's proportionate share of the objected to contributions is small is of no moment, "[f]or, whatever the amount the quality of [petitioner's] interest in not being compelled to subsidize the propagation of political or ideological views that [he] oppose[s] is clear" (*Chicago Teachers Union v Hudson*, 475 US, at p —, 106 S Ct, at p 1075).[4] To petitioner Cahill one salient fact remains: he is compelled to support

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[3] We note that the current policy of the PSC in permitting utilities to include charitable contributions as costs conflicts with judicial decisions in other jurisdictions holding similar pass-through provisions unlawful as involuntary levies on ratepayers (*see, e.g., Pacific Tel. & Tel. Co.* v. *Public Utils, Commn.*, 62 Cal 2d 634, 401 P.2d 353 [1965]; *Chesapeake & Potomic Tel. Co.* v. *Public Serv. Commn.*, 230 Md 395, 187 A2d 475 [1963]; *Illinois Bell Tel. Co.* v. *Illinois Commerce Commn.*, 55 Ill 2d 461, 303 NE2d 364 [1973]; *State ex rel. Laclede Gas Co.* v. *Public Serv. Commn.*, 600 SW2d 222, 229 [Mo 1980], *appeal dismissed* 449 US 1072 [1981]).

[4] Justice Stevens in *Chicago Teachers Union* v. *Hudson* (475 U.S. —, 106 S Ct 1066, 1075), stressing the point that "[t]he amount at stake for each individual dissenter does not diminish [his] concern", writes: "In *Abood*, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical

(footnote continued on following page)

institutions he opposes on moral and religious grounds because he must subscribe to the utility and pay rates based, in part, on those contributions, or be deprived of his right to electric and telephone service.

We address only the question certified by the Appellate Division. The respondents' remaining contentions, that the petition should be dismissed due to petitioner's failure to exhaust administrative remedies, that the petition was not timely commenced, and that petitioner lacked standing to bring the proceeding are not before us. The certified question should be answered in the negative and the order of the Appellate Division should be affirmed, with costs.

DISSENTING OPINION

TITONE, J. (dissenting). Petitioner commenced this proceeding to challenge a decision of the Public Service Commission (PSC) that allows utility companies to pass along a portion of the cost of their charitable donations to their ratepayers. His challenge is based on the claim that the decision impairs petitioner's and other ratepayers' Federal First Amendment rights to freedom of expression and worship by requiring them to contribute indirectly to charitable groups espousing views antithetical to their own. However we may feel about the wisdom of the PSC's policy, we conclude that the State's regulatory involvement in the cost pass-along that petitioner finds offensive is an insufficient basis for finding that his rights have been impaired by the actions of a governmental entity. Accordingly, we dissent and vote to reverse the Appellate Division order.

The Public Service Commission decision that is challenged here was actually made in 1970. Prior to 1970, the

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(footnote continued from preceding page)

character of forcing an individual to contribute even 'three pence' for 'the propagation of opinions which he disbelieves' ".

PSC exercised its regulatory authority over utility rates by requiring the utilities' shareholders to absorb the cost of charitable contributions rather than passing those costs along to the consumer in the form of increased prices for utility service. The PSC rescinded this policy in 1970 and replaced it with a ruling allowing utilities to recover from ratepayers a portion of their charitable contribution costs calculated by a formula based on the individual utility's adjusted pre-1970 level of expenditure (*New York Tel. Co.*, case 25155, 10 NY PSC 345, 84 PUR3d 321, 349-350). This change in policy reflected the PSC's view that charitable contributions can be a legitimate business expense that ought to be recognized as a form of overhead. In its ruling, the PSC stated that "it is not our function to screen lists of contribution, to pick out the good from the bad," but it further noted that it was "prepared to examine carefully claims for charitable contributions" and would disallow such claims "if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility" (*New York Tel. Co.*, 10 NY PSC, at p 379, 84 PUR3d, at p 349). In accordance wtih this policy, the PSC, in June of 1984, approved a request by the New York Telephone Company to include in its rates to consumers part of the cost of its contributions to several thousand charitable organizations. Petitioner thereafter commenced the present CPLR article 78 proceeding, arguing that the PSC's actions in approving the pass-along violated both the establishment and freedom of expression clauses in the First Amendment of the Federal Constitution.[1] Petitioner's constitutional claim is based

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[1] Petitioner has not asserted any claim that his rights under our State Constitution (NY Const, art I, § 8) have been violated (*compare, SHAD Alliance* v. *Smith Haven Mall*, 66 NY2d 469, *with Sharrock* v *Dell Buick-Cadillac*, 45 NY2d 152).

largely on the Supreme Court's decision in *Abood v Detroit Bd. of Educ.* (431 US 209), in which the court held that forced indirect contributions to political groups in the form of mandatory agency-shop dues violates an employee's right to freedom of expression. In *Abood,* however, the dues payments were mandated by a collective bargaining agreement between the union and a governmental employer and were enforced by that employer's coercive power to discharge those who did not wish to participate. Thus, there was no doubt in *Abood* that the constitutional violation complained of was the product of State action.

Here, in contrast, the question of the State's involvement is very much in dispute. Although petitioner insists that his quarrel is solely with the policy decision of the PSC, a governmental entity, it is apparent that the real source of his aggrievement is the action of the private utility, which, through the inherently coercive power of its status as a monopoly provider, is forcing him to make indirect contributions to charities he finds objectionable.[2] Consequently, although the majority concludes otherwise, *Abood* is manifestly not controlling here. What is more in point is the body of case law that addresses the problem of when the actions of a private entity may fairly be said to constitute "State action."

It is beyond question that the First and Fourteenth Amendments, upon which petitioner's claim depends, provide "no shield against merely private conduct, however * * * wrongful" (*Shelley v Kraemer,* 334 US 1, 13; *see,*

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[2] Contrary to the majority's view, that petitioner initially named the PSC and not the utility as the party defendant is of no consequence. In determining whether a claimed deprivation of a constitutional right involves an action by the State or merely a private decision, we look to the substance of the claim and not to the status of the party who has been sued (*see Blum* v *Yaretsky,* 457 US 991, 1003).

Hudgens v NLRB, 424 US 507; *SHAD Alliance v Smith Haven Mall*, 66 NY2d 396). Rather, those amendments protect only against those infringements of liberty that may in some sense be said to emanate from the actions of the State (*see, Jackson v Metropolitan Edison Co.*, 419 US 345). It has been candidly acknowledged that "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer" (*Jackson v Metropolitan Edison Co., supra*, at pp 349-350). Nonetheless, there are a number of previously applied standards that provide us with some guidance.

First, the fact that the private concern is heavily regulated by government is not alone sufficient to render the conduct of that private entity "State action" (*Jackson v Metropolitan Edison Co., supra*, at pp 350-353; *see, Blum v Yaretsky*, 457 US 991). While the actions of private concerns having these characteristics may "more readily be found to be 'state' acts" than will the actions of others, there must still be a "sufficiently close nexus between the State and the challenged action * * * so that the action * * * may be fairly treated as that of the State itself" (*Jackson v Metropolitan Edison Co., supra*, at p 351). Significantly, this "nexus" cannot be established by simply showing that the private entity provides an essential public service or has a monopoly on the market, where the service in question is not one that the State would traditionally provide (*id.*, at pp 351-353).

A sufficient nexus may be demonstrated where the private action in question was compelled or directed by the State (*see, Blum v Yaretsky, supra*, at pp 1004-1005; *Jackson v Metropolitan Edison Co., supra*, at p 457). Alternatively, "State action" may be found to exist where the State "has exercised coercive power or has provided significant en-

couragement" so that the private choice may be deemed to be effectively that of the State (*Blum v Yaretsky, supra,* at p 1004; *see, Flagg Bros. v Brooks,* 436 US 149, 166). What is made absolutely clear by the case law, however, is that the State's mere acquiescence in the conduct of a regulated private entity does not transform an essentially private choice into a governmental action (*Blum v Yaretsky, supra,* at pp 1004-1005; *Jackson v Metropolitan Edison Co., supra,* at p 357; *see Montalvo v Consolidated Edison Co.,* 92 AD2d 389, *aff'd on opn below* 61 NY2d 810).

In this case, petitioner argues that the charitable contribution pass-along has the earmarks of State action because the combination of the State's intensive involvement in rate-setting and the utilities' status as franchised monopoly providers results in his having to make forced contributions under the State's sponsorship. In this respect, however, petitioner's argument is no different in substance from that made by the dissenters and explicitly rejected by the majority in *Jackson v Metropolitan Edison Co.,* (*supra,* at pp 351-352, 360-364 [Douglas, J., dissenting], at pp 366-373 [Marshall, J. dissenting]). Indeed, the majority's conclusion that "the combined effect of the utility's monopoly status and the rate order is no less coercive than the threat of employment loss in *Abood*" is virtually indistinguishable from Justice Douglas' argument that State action should be found to exist because "in the aggregate" such factors as Metropolitan Edison's State-authorized monopoly, its unilateral control over an essential public service and the "framework of extensive state supervision and control" warranted that conclusion (*id.,* at pp 361-362 [Douglas, J., dissenting]). While it is true that, as a practical matter, the utilities' monopolistic status gives

them a power to coerce that is equal in some respects to the coercive power of government, that circumstance alone does not transform what has traditionally been a private activity into a governmental one. Accordingly, although the coercion present in *Abood* is analogous to the coercion present here, the fact remains that in this case, unlike in *Abood,* the coercion is an unfortunate by-product of private, not State, action.

Further, the fact that the PSC plays a vital role in the rate-setting process does not render the billing practices of the utilities the equivalent of "State action." The PSC was created by the Legislature to oversee utilities precisely because their monopoly status would otherwise enable them to engage unfettered in rate-setting and other practices inimical to the public welfare. Having undertaken to regulate utilities, however, the State did not thereby become the initiator of the utilities' actions.

It is true that providers of gas, electric and telephone services are not permitted to charge more than the PSC permits (*see,* Public Service Law § 65 [1]; § 91 [1]), and once the permissible rates are established, the utilities are not free to charge their customers *less* (Public Service Law § 66 [12]; § 92 [2]). However, the process by which those rates are established amply demonstrates that it is the utility, and not the PSC, which is the initiator of the disputed pass-along decision. As described in the PSC's brief, the process consists, in simplified form, of the utility's submitting a schedule of "revenue requirements" calculated on the basis of anticipated operating expenses. The PSC reviews these schedules and determines which items of projected expenses should be disallowed. The remaining "revenue requirements" then become the basis of the rates the utilities' customers pay. Manifestly, these are charges

in which the PSC has, in the truest sense of the word, merely "acquiesced" by failing to disallow them.

When examined closely, petitioner's claim amounts to nothing more than a contention that the State has refused to interfere with the utilities' decisions to pass along their charitable contribution costs to their customers, the ratepayers. There is no allegation that the PSC has compelled this activity, and, indeed, there could be none. Nor can there be any colorable claim that the activity by which petitioner feels himself aggrieved is, overtly or covertly, coerced by the State, since it is virtually inconceivable that the coercive powers of the government would be necessary to induce private concerns such as the utilities involved in this case to pass along their costs rather than absorbing those costs themselves.

Indeed, the key to analysis in a case such as this is to subtract the government from the equation and then consider what the behavior of the private entity would be without any governmental intervention at all. As the Supreme Court has stated, "[t]he nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval" (*Jackson v Metropolitan Edison Co., supra,* at p 357). Here, if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make.[3] By allowing these utilities to

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[3] Contrary to the majority's assertion (majority opn., at p 271), we do not advance the PSC's noninvolvement in rate-setting as a

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engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no State involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision.[4]

To be sure, one of the motivating factors behind the PSC's change in policy may well have been a desire to spur utilities to make charitable donations and thereby contribute to the public welfare (*see, New York Tel. Co.*, 10 NY PSC, at pp 378-379, 84 PUR3d, at pp 349-350, *supra*). This underlying intention, however, does not constitute the type of "significant encouragement" that will convert the private decision at issue here into a governmental one (*cf. Blum v Yaretsky, supra,* at pp 1008-1009, n 19). Indeed, while the PSC may have intended to encourage private contribution, an activity which is itself unobjectionable, it has done nothing affirmatively to encourage the utilities to pass along the attendant costs to their

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"valid proposition" that requires "support in law or fact." Rather, we merely posit that noninvolvement hypothetically, as a means of demonstrating that, despite the majority's suggestion to the contrary (at p 273), the utilities' power to charge rates for their services is not derived from the PSC, but rather is a natural incident of their status as owners of those services.

[4] To the extent that private business concerns choose to make such donations out of their profits, it may be that they do so because of their belief that the market will not tolerate an increased price for their goods or services. Of course, utilities generally do not need to make such sensitive price calibrations, since their services are public necessities and the consumer simply cannot take this business elsewhere. Thus, to a large extent, utilities are free, in the absence of regulation, to pass along many types of business expenditures that other corporations would elect to absorb. This circumstance, however, is a by-product of utilities' status as monopolies, and not a result of any governmental intervention.

customers. Again, that is a decision which the PSC has merely approved or, more specifically, failed to interdict.

We note in closing that there is no allegation, in either the pleadings or the papers submitted on the dismissal motion, that the PSC has actually engaged in a qualitative review of the donees the utilities select as the objects of their generosity.[5] In contrast, the PSC has asserted that it has never required utilities to make charitable contributions or to select particular organizations for the contributions they choose to make. Further, the PSC has alleged that it has never interfered with a utility's choice of donees, although in 1970 it indicated that it might do so. Had it done so, our disagreement with the majority might not have been so acute.

In sum, it is evident that the PSC is not the source of petitioner's grievance and, consequently, we cannot agree that his rights under the First and Fourteenth Amendments have been violated. While the PSC has the power to, and in fact has in the past, forbid the practice to which petitioner objects, its refusal to exercise its authority in that manner now does not imbue the utilities' conduct with the characteristics of "State action." Thus, while reasonable minds may differ as to the wisdom of the PSC's policy of nonintervention in this area, it cannot be said that Federal constitutional rights are implicated. Inasmuch as we are bound by Supreme Court precedent in interpreting the Federal Constitution, we can reach no other conclusion than that the petitioner's proper remedy, if remedy there should

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[5] Although Special Term indicated that petitioner had made such allegations, our own review of the papers does not bear out this conclusion. Indeed, in the briefs petitioner submitted in response to the dismissal motion, he acknowledged that the "recipients are selected solely at the discretion of the utility" and that "it is the express policy of the PSC not to regulate or screen the contributions or their recipients."

be, rests with the Legislature, which has the authority to direct the PSC in the use of its regulatory powers (*see, e.g.*, Public Service Law § 91 [2] [b]).

Accordingly, we would reverse the order of the Appellate Division and dismiss the petition in its entirety.

Judges MEYER, SIMONS, KAYE and ALEXANDER concur with Judge HANCOCK, JR.; Judge TITONE dissents and votes to reverse in a separate opinion in which Chief Judge WACHTLER concurs.

Order affirmed, etc.

Order of the Court of Appeals Denying Rehearing

COURT OF APPEALS

STATE OF NEW YORK

Mo. No. 140

In the Matter of

JOSEPH CAHILL,

Respondent,

vs.

PUBLIC SERVICE COMMISSION, et al.,

Appellants,

CENTRAL HUDSON GAS AND ELECTRIC CORP.,

Intervenor-Appellant.

Motions for reargument and for clarification denied.

Mar 24 1987

Opinion of the Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

January 23, 1986

In the Matter of

JOSEPH CAHILL,

Respondent,

v

PUBLIC SERVICE COMMISSION et al.,

Appellants,

and

CENTRAL HUDSON GAS AND ELECTRIC CORPORATION,

Intervenor-Appellant.

SUMMARY

APPEAL from an order of the Supreme Court at Special Term (Lawrence E. Kahn, J.), entered June 12, 1985 in Albany County, which, in a proceeding pursuant to CPLR article 78, denied motions by respondents to dismiss the petition.

Cahill v Public Serv. Commn., 128 Misc 2d 510, affirmed.

OPINION OF THE COURT

HARVEY, J.

Petitioner is a customer of both respondent New York Telephone Company and intervenor Central Hudson Gas and Electric Corporation. In October 1984, he commenced the instant CPLR article 78 proceeding seeking an order directing respondents to cease the practice of passing along the cost of charitable contributions to customers. Petitioner also sought an order amending respondent Public Service Commission's (PSC) June 22, 1984 rate order to eliminate the PSC's recognition and authorization of New York Telephone's practice of passing along the cost of its charitable contributions to its customers as part of the rates it was authorized to charge.

Respondents elected not to interpose an answer, but rather moved for dismissal of the article 78 petition asserting objections in point of law (CPLR 7804 [f]). Respondents asserted that the court lacked jurisdiction since the subject matter raised was within the exclusive purview of the PSC. Respondents also asserted that petitioner failed to exhaust administrative remedies and that the petition, which was predicated on a violation of petitioner's rights as set forth in US Constitution 1st and 14th Amendments, failed to state a cause of action.

Special Term denied respondents' motion in all respects (128 Misc 2d 510). That court properly noted its jurisdiction to entertain an article 78 proceeding which raises claims of a violation of constitutional rights as a consequence of actions taken by public regulatory bodies (*see, Consolidated Edison Co. v Public Serv. Commn.*, 447 US 530, 533; *see also, Matter of Consolidated Edison Co. v Public Serv. Commn.*, 107 AD2d 73).

Respodents contend as one of their objections in point of law that petitioner failed to state a cause of action for article 78 relief. Since respondents elected not to submit an answer prior to moving for dismissal of the petition by setting forth objections in point of law as provided for in CPLR 7804(f), their motion is one in the form of a CPLR 3211 motion addressed to the pleadings (*see, Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs.*, 63 NY2d 100, 102-103; McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7, p 507). Examining the petition and accepting the facts alleged to petitioner, as we must, we find that the article 78 petition states a claim for relief (*see, Matter of Board of Educ v Allen*, 32 AD2d 985).

It is essential to the survival of this proceeding that the petition allege a violation of petitioner's 1st Amendment rights by some "State action". For, while the 14th Amendment provides protection of a citizen's constitutional rights from encroachment by State Government action, it has no applicability to private discriminatory or wrongful conduct (*Jackson v Metropolitan Edison Co.*, 419 US 345, 349-350). Petitioner states that the PSC established a policy in 1970 which permitted the utilities it regulates to pass along the cost of charitable donations to ratepayers. The PSC's "prime function * * * as a regulatory body, is [in separating] those costs which should be borne by ratepayers from those which are properly chargeable to shareholders" (*Rochester Gas & Elec. Corp. v Public Serv. Commn.*, 51 NY2d 823, 825, *appeal dismissed* 450 US 961). The PSC is a creation of the Legislature (Public Service Law §§ 3, 4; *see, Matter of Consolidated Edison Co. v Public Serv. Commn.*, 47 NY2d 94, 102, *revd* 447 US 530). By alleging that the PSC adopted a policy which permitted the costs of

charitable donations to be passed along to ratepayers, petitioner has adequately stated the threshold claim of "State action" (*Jackson v Metropolitan Edison Co., supra,* pp 349-350).

Petitioner goes on to allege in the article 78 petition that the policy promulgated by the PSC results in ratepayers' funds being directed to a variety of charitable causes without any notice to, or input by, those individuals. Petitioner also contends that donations made to specific charities are violative of his religious beliefs. Petitioner's claim for relief is that the PSC's policy constitutes unlawful State action since it has the end result of compelling an individual ratepayer to indirectly support an organization whose philosophy the ratepayer opposes on religious or other personal grounds. Accepting petitioner's allegations and construing them in his favor, we find that he has stated a cause of action which alleges a violation of his rights under US Constitution 1st and 14th Amendments (*Torcaso v Watkins,* 367 US 488; *see, Wooley v Maynard,* 430 US 705; *see also, Abood v Detroit Bd. of Educ.,* 431 US 209).

Respondents' contention that petitioner has failed to exhaust his administrative remedies does not present a bar to the court's entertaining the instant petition. Where, as here, a petitioner's claim is based solely on a constitutional challenge, the exhaustion of administrative remedies requirement is inapplicable (*Matter of Emery v LeFevre,* 97 AD2d 931, 932). The proceeding is timely since the nature of the relief sought by petitioner is to address an alleged continuing violation of his constitutional rights (*see Matter of Burke v Sugarman,* 35 NY2d 39, 45).

LEVINE, J. (dissenting). In our view, under current State-action principles applied by the United States Supreme Court (*see, Blum v Yaretsky,* 457 US 991; *Rendell-Baker*

v Kohn, 457 US 830; *Flagg Bros. v Brooks,* 436 US 149; *Jackson v Metropolitan Edison Co.,* 419 US 345), petitioner has failed to plead any violation of his 1st Amendment rights on the part of respondent Public Service Commission (PSC). State-action analysis begins with "careful attention to the gravamen of the plaintiff's complaint" (*Blum v Yaretsky, supra,* p 1003). The gravamen of the complaint in the instant case is found in paragraphs 7, 8 and 9 of the petition. The constitutional deprivation complained of is that petitioner is being "compelled to support * * * charities * * * by means of including coerced contributions in his utility bills" (para 7); that the PSC "*permits* the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests of the customers" (para 8; emphasis supplied); and petitioner "has no alternative means of obtaining the basic utility services the New York Telephone Company provides him in his home geographic area" (para 9).

Nowhere in the foregoing key allegations, nor elsewhere in the petition, are facts pleaded which attribute the claimed constitutional deprivation to the PSC other than indirectly through its purely regulatory authority over respondent New York Telephone Company (NYT). Any invasion of petitioner's 1st Amendment rights directly results from the acts of NYT, a private corporation. It is NYT, and not the PSC, that adds the proportionate share of the cost of its charitable donations to petitioner's telephone bill and threatens petitioner with discontinuance of service if the bill is not paid in full. This being the case, to establish the requisite State action on the basis of NYT's acts, there must be found "a sufficiently close nexus between the State and the chal-

lenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" (*Jackson v Metropolitan Edison Co., supra,* p 351). Detailed inquiry may be required as to the true nature of the State's involvement *(supra).*

The Supreme Court has rather precisely enunciated the test for State action when the constitutional challenge is made to the decisions or the acts of a private entity. A State normally can be held responsible "only when it has *exercised coercive power* or has provided such *significant encouragement,* either overt or covert", that the act or decision is deemed that of the State itself; "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" (*Blum v Yaretsky, supra,* p 1004; emphasis supplied). The only other identified instance of imputing to a State the results of private initiative is when the private entity exercises powers that are " 'traditionally the exclusive prerogative of the State' " (*supra,* at p 1005, quoting *Jackson v Metropolitan Edison Co., supra,* p 353).

The petition and other papers submitted at Special Term simply did not meet the foregoing requirements for attributing NYT's acts to the PSC. The record is devoid of anything but conclusory allegations of the PSC's overt or covert encouragement to NYT's charges of which petitioner complains. The PSC's policy, announced in a 1970 ruling permitting utilities to include charitable contributions as a legitimate operating expense, is entirely neutral on the issue. It merely recognizes the modern reality of corporate life that it is good business for corporate citizens (utilities included) to support charitable causes in the communities where they exist and operate. The 1970 ruling expressly disclaimed any screening function in approving charitable contributions as a utility-operating expense except as to

whether such contributions are truly eleemosynary. Petitioner has not set forth any factual basis suggesting that the PSC has deviated from that position in the 15 years that the policy has been in effect. Demonstrative of the absence of any overt or covert encouragement is the fact that the PSC has limited its approval to pre-1970 utility contribution levels, adjusted for inflation. Such unaligned approval of or acquiescence in the utility practice of making charitable donations and then passing them on to customers is insufficient to hold the State responsible (*Blum v Yaretsky*, 457 US 991, 1004-1005, *supra*). The fact that approval of the challenged act of NYT by the PSC initially took the form of a general policy statement in 1970 does not support any inference of State encouragement. Even express statutory authorization of a private act does not convert such conduct into State action (*Flagg Bros. v Brooks*, 436 US 149, 165, *supra*).*

Nor has petitioner pleaded any facts or otherwise shown that the PSC has itself exercised any coercive power to exact a share of NYT's philanthropies from him. As previously discussed, the PSC does not mandate the making of contributions and does not require any utility to file a proposed rate tariff which includes such contributions as a recoverable operating expense. No rule, regulation or practice has been cited by petitioner to support any inference that the PSC would *require* termination of telephone service were a subscriber to deduct from his utility bill the portion thereof attributable to such contributions.

Similarly unaivailing is petitioner's reliance on NYT's monopoly position in providing telephone service, a func-

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* To the extent that *Public Utilities Commn.*, v *Pollak* (343 US 451) may have held to the contrary, its precedential value has been virtually eliminated by *Jackson* v *Metropolitan Edison Co.* (419 US 345, 356).

tion heavily affecting the interest of the public. This ground for attributing the conduct of a public utility to a State was expressly rejected in *Jackson v Metropolitan Edison Co.* (419 US 345, 351-352, *supra*), which also held that the furnishing of utility service is not a function traditionally the exclusive prerogative of a State (*supra,* at p 353).

In short, the instant case falls squarely under *Blum* and *Jackson (supra).* In essence, they hold that the requisite nexus between the challenged act or decision of a private entity and a State is not established merely because (1) the entity is heavily regulated, (2) its market position is enhanced by State regulation, and (3) a State regulatory agency has authority to prevent the conduct complained of. Nothing more has been shown here.

Contrary to petitioner's contention, *Abood v Detroit Bd. of Educ.* (431 US 209) does not support the opposite conclusion. In *Abood,* the Supreme Court struck a Michigan labor statute sanctioning an "agency shop" contract requiring nonunion member employees to pay a service fee equivalent to union dues as a condition of employment, insofar as such fees may be applied to fund political activities of the union. *Abood* is quite distinguishable. First, *Abood* notes that such an agency or union shop contract is an integral element of an express legislative policy to foster exclusive representation of employees in the collective bargaining process (*supra,* at pp 220-222). Here, as has already been discussed, the PSC's policy is neutral as to the challenged action of NYT. Secondly, as the State-action discussion in *Abood* explains (*supra,* at p 218, n 12), it is only by virtue of legislative approval that such agency shop arrangements are enforceable. In the instant case, the PSC's power to prevent the charging of customers for the utilities' donations is totally derived from the PSC's

general rate-setting authority. Without that regulatory control, NYT, like any other private corporation, would be free to pass on its charitable expenses as a cost of doing business. Finally, once the agency shop contract in *Abood* was entered into, Michigan law *mandated* the employer to discharge any nonunion employee who refused to pay the service fee, and a third party (the union) was given the right to enlist the coercive power of the State to enforce that obligation on the part of the employer. No such coercive power, either to mandate NYT's imposition of the challenged charges or to terminate petitioner's telephone service for nonpayment thereof, has been pleaded here.

For all the foregoing reasons, Special Term's order should be reversed and the petition dismissed.

MAIN, J. P., and YESAWICH, JR., J., concur with HARVEY, J.; MIKOLL and LEVINE, JJ., dissent and vote to reverse in an opinion by LEVINE, J.

Order affirmed, with costs.

Opinion of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM—ALBANY COUNTY

May 14, 1985

JOSEPH CAHILL,

Petitioner,

v

PUBLIC SERVICE COMMISSION *et al,*

Respondents.

OPINION OF THE COURT

LAWRENCE E. KAHN, J.

In the above-captioned CPLR article 78 proceeding, petitioner seeks to require the respondent Public Service Commission (PSC) to abandon its policy of permitting public utilities to include charitable contributions as authorized expenditures in establishing utility rates. The instant litigation challenges the PSC's policy upon the narrow issue that it violates petitioner's 1st Amendment right of free expression and freedom of religion. The court has granted prior motions to add New York Telephone Company (Company) as a necessary party and further, to permit intervention by Central Hudson Gas and Electric Corporation. No answer has been served. All respondents have moved to dismiss the petition on various grounds, including lack of subject matter jurisdiction, Statute of Limitations, and failure to exhaust administrative remedies.

Initially, it is clear that this court has subject matter jurisdiction to render a determination on the merits of petitioner's allegations, and that the doctrine of exhaustion of administrative remedies is not a bar to the present litigation. Relief is sought in the nature of mandamus vis-à-vis the PSC. Petitioner seeks no relief against any specific utility, but rather, challenges a policy of the PSC which has been in effect since 1970. As such, there is no special expertise which would necessitate that this court defer to an administrative agency for a resolution of the dispute. Rather, resolution of the issue is grounded in constitutional considerations and thus certainly within the purview of this court. Similarly, a determination on the merits need not be avoided by dismissal for failure to exhaust administrative remedies. Petitioner raises only constitutional issues, and seeks no monetary relief. The submissions before the court are replete with reference to the PSC's continuing adherence to the principle that inclusion of charitable contributions in operating expenses of a utility is acceptable for rate-making purposes. The policy was first articulated in case 25155, July 1, 1970, and repeated in the latest rate-making determination which is the subject of this challenge (case 228601). While there have been various individual objections from within the PSC concerning this policy, and introduction of proposed legislation to alter it, such a result has never been achieved. Given these realities, and the limitation of this litigation to constitutional claims, a dismissal for failure to exhaust administrative remedies would be the supreme example of invoking form over substance (*Matter of First Natl. City Bank v City of New York Fin. Admin.*, 36 NY2d 87; *Usen v Sipprell*, 41 AD2d 251).

Finally, respondents seek dismissal premised upon petitioner's failure to state a cause of action under either US

Constitution 1st or 14th Amendment. In resolving this issue, it has long been recognized that "if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies" (*Foley v D'Agostino,* 21 AD2d 60, 65, n 1). The test is twofold. The pleading must give notice of the transactions relied upon and assert sufficient material elements to constitute a cause of action (*Jerry v Borden Co.*, 45 AD2d 344). Petitioners are to be afforded the benefit of every possible favorable inference (*Rovello v Orofino Realty Co.*, 40 NY2d 633).

While respondents have not yet answered, apparently the PSC allows inclusion of charitable donations as a cost of doing business in establishing rate structures for public utilities. This policy has existed since 1970. The amount is established pursuant to a formula premised upon pre-1970 corporate charitable donations, trended forward with an inflation factor. On or about June 22, 1984, the PSC, in determining a rate request for New York Telephone, allowed inclusion of charitable donations for 1984 in the sum of approximately $3,000,000. Petitioner alleges that he is a practicing Catholic and objects to funding of charities which support the right to an abortion. He further asserts that the above denies him the rights of free expression and free exercise of religion, and most importantly, that the activities of the PSC constitute "state action" within the purview of 42 USC § 1983, and as such, violate his aforesaid 1st Amendment guarantees.

Petitioner relies upon *Abood v Detroit Bd. of Educ.* (431 US 209), for the proposition that the policy of the PSC constitutes "state action." Quoting Thomas Jefferson, the *Abood* court reiterated that " ' "to compel a man to furnish contributions of money for the propagation of opinions

which he disbelieves, is sinful and tyrannical" ' " (p 235, n 31). While this court is enthusiastic in its indorsement of such a philosophy, nevertheless, it is applicable to the case at bar only if petitioner actually establishes that "state action" is present. State action "is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the acts complained of (see: *Jackson v Metropolitan Edison Co.*, 419 U. S. 345, 351)." (*Karp v Consolidated Edison Co.*, Spec Term, NY County, May 24, 1984, calendar Nos. 71, 151.)

The philosophy of corporate charitable contributions is rooted in the notion that a business should be an integral part of the community and benefits when it helps bolster the quality of life in the area it serves. Such contributions tend to enhance customer relations and attitudes. Business Corporation Law § 202(a)(12) expressly provides that a corporation has the power "[t]o make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof."

The PSC's motion to dismiss is supported by affidavits asserting that it does not compel contributions, nor does it designate a particular charity or the exact amount of any contribution. However, the petition alleges the converse and that while the PSC may not actively participate in determining a utility's choice of charities in the first instance, this does not negate the presence of State action. Petitioner asserts that, in fact, each rate-making determination which approves a proposed charitable contribution must be viewed as a determination by the PSC, that the contribution is

allowable as "relevant to the civic responsibilities of the public utility" and not "demonstratively imprudent." As aforesaid, in 1970, the PSC determined for the first time to allow charitable contributions to be included as a necessary operating expense. "We are prepared to examine carefully claims for charitable contributions *** and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in which they were not considered allowable expenses will serve as benchmark for the future." Thus, the PSC's reservation of authority is twofold. It reserves the right to determine the *amount* of appropriate corporate contributions. It also reserves control of the *specific contribution,* approving only those which it deems relevant to the utility's civic responsibilities. Subsequently, it has also articulated a standard for disallowing charities which are "demonstratively imprudent."

"[A]cts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found in the 'state' acts than will the acts of an entity lacking these characteristics *** the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (*Jackson v Metropolitan Edison Co.,* 419 US 345, 351.) State action is present in each instance where the PSC applies its "relevant civic responsibility" test during the rate-making process. In such instances, the PSC is not merely affording a utility the choice of making a charitable contribution, but more significantly, and thereby creating a significant nexus, it is determining those charities which *it* feels comes within the standards which *it has set*

for acceptable charitable giving. Thus, the PSC is not merely acquiescing in an otherwise acceptable business practice, but is engaged in an active supervisory role on a continuing basis.

The petitioner alleges that respondents approve funding of charities who support practices which are violative of his religious beliefs. Assuming the truth of this allegation, as the court must at this stage of the litigation, it becomes apparent that such activity by the State would be prohibited by guarantees contained in US Constitution 1st Amendment. As such, the petition states a cause of action, thereby requiring denial of respondents' motion.

The motion to dismiss the petition upon the ground of lack of subject matter jurisdiction, failure to exhaust administrative remedies, that the proceeding is barred by the applicable Statute of Limitations, and that the petition fails to state a cause of action, shall be denied. All papers to attorney for petitioner, who shall submit an order in conformance herewith, with a copy of this decision annexed thereto. Respondents shall be granted 20 days in which to serve an answer. Thereafter, petitioner may renotice this proceeding on 10 days' notice at any subsequent appropriate Special Term.

Constitutional Provisions

Amendment I to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1 of the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law.

New York Public Service Law

New York Public Service Law Section 92(2) provides:

2. No change shall be made in any rate, charge or rental, or joint rate, charge or rental which shall have been filed by a telegraph corporation or telephone corporation hereinafter in this subdivision called a utility in compliance with this chapter, except after thirty days' notice to the commission and to each county, city, town and village served by such utility which had filed with such utility within the prior twelve months a request for such notice and shall be affected by such change and publication of a notice to the public of such proposed change once in each week for four successive weeks in a newspaper having general circulation in each county containing territory affected by the proposed change, which notice shall plainly state the changes proposed and the time when they go into effect. All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon the schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may, except in the case of major changes, allow changes in rates, charges or rentals to take effect prior to the end of such thirty-day period and without publication of notice to the public under such conditions as it may prescribe; all such changes shall be immediately indicated upon its schedules by such utility. For the purpose of this subdivision, "major changes" shall mean an increase in rates, charges and rentals which would increase the aggregate revenues of the applicant more than the greater of one hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals allowed to go into effect by the commis-

sion or made by the utility pursuant to an order of the commission after hearings held upon notice to the public. No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service. Whenever there shall be filed with the commission by any utility, any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission may at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative, and, if it so orders, without answer or other formal pleading by the utility, but upon reasonable notice, hold a hearing concerning the propriety of such change, provided that if such change is a major change the commission shall hold such a hearing; and, pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the utility, a statement in writing of its reasons therefor, may suspend the operation of such schedule, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after it goes into effect, the commission may make such order in reference thereto as would be proper in a proceeding begun

after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility has become effective. Provided that, if such hearing cannot be concluded within the period of suspension as above stated, the commission may extend the suspension for a further period, not exceeding six months. The commission may, as authorized by section ninety-seven, establish temporary rates, charges or rentals, for any period of suspension under this section. At any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it.

During the suspension by the commission as above provided, the schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the suspended schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force unless the commission shall establish a temporary rate.

Regulatory Decisions

Excerpt from *Re New York Telephone Co.*, 24 N.Y. P.S.C., 2627, 2693-97, 61 PUR 4th 337, 366-69 (1984)

Charitable Contributions

The Judges made a number of findings and recommendations regarding rate year charitable contributions by New York Telephone:

1. Citing our consistent treatment of the argument, they rejected the Coalition's contention that no charitable contributions may be recovered in rates.

2. They recommend adopting staff's primary proposal to follow the practice of the past 15 years by using a 1969 benchmark amount as adjusted for inflation.

3. They recommend rejecting staff's secondary proposal that the inflation adjusted benchmark be reduced by 12%—to reflect an equal reduction in Telephone Plant in Service (TPIS)—because we never have used TPIS as the basis for the benchmark.

4. They recommend rejecting staff's proposal to disallow $1,005,000 of contributions to the Telephone Pioneers of America because, in New York Telephone's last rate case, we said that "where the purpose of the organization's activities can fairly be characterized as either employee-related or charitable, we believe the better solution is to treat the related expenditures outside the scope of the charitable contributions benchmark." [1]

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[1] R.D., pp. 3141-3142, citing Case 28264, *supra*, Opinion No. 83-11, mimeo p. 120.

5. They recommend rejecting the company's proposal to treat expenses associated with its loan of employees program, matching gift program, and Summer Arts Festival outside the inflation adjusted 1969 benchmark because they thought these contributions were ordinary charitable contributions, distinguishable from the company's indirect support of charitable efforts by the Telephone Pioneers of America.
6. They recommend rejecting the argument that the company's contributions to the National Regulatory Research Institute (NRRI) should be classified as a charitable contribution and subject to the 1969 inflation adjusted benchmark.

The combined effect of the Judges' recommendations is to reduce the company's revenue requirement by about $2.57 million.[2] The company, staff, the Coalition, and DOL except to a number of the Judges' recommendations.

The Coalition, joined by DOL, renews its objection to any rate recovery of charitable donations in the absence of a showing that these amounts contribute to "just and reasonable" service, as it claims is required by PSL § 97(1). If such costs are to be included in rates, however, these parties urge that we permit a mechanism whereby ratepayers could have a voice in the selection of recipients of New York Telephone's charitable contributions because ratepayers are assertedly a better judge of who would benefit the most from these contributions. The Coalition also argues that we should disallow certain expenses to be incurred in connection with the Telephone Pioneers of America.

These are the same arguments raised in the company's last and next-to-last rate cases. In rejecting them, we said:

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[2] R.D. Appendix E, Schedule 5, line 22 as adjusted for income taxes.

> Here, as on numerous prior occasions, we reject the consortium's claim that all charitable contributions must be disallowed, because we have long held that the company's legitimate, necessary expenditures include such contributions unless they are demonstrably imprudent.[1]

We also found impractical a proposal to permit ratepayers to participate in selecting the recipients of the company's charitable contributions. The Coalition and DOL have not argued persuasively for abandonment of these precedents, and their exceptions are denied.

The company, for its part, excepts to the continued application of the benchmark limitation, contending its unrebutted evidence showed that newly emerging factors—such as federal cuts in aid to non-profit organizations, reductions in public service and the like—render inappropriate further application of the 1969 benchmark. And it renews its request that expenses associated with its loan of employees program ($90,000), matching gift program ($700,000) and the Summer Arts Festival ($25,000) not be treated as charitable contributions on the grounds these programs improve employee morale and thus fall within the same category of employee-related expenses as do contributions for the Telephone Pioneers of America.[1]

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[1] Cases 27995, *et al., supra,* Opinion No. 82-6, mimeo p. 34. See also Case 28264, *supra,* Opinion No. 83-11, mimeo pp. 120-121 (regarding total disallowance) and p. 120 (regarding the Telephone Pioneers of America).

[1] According to the company, the matching gift programs benefit employee-designated schools, which benefit those employees and ratepayers, and give employees a direct role and sense of involvement in the company's programs; the loaned employees improve job skills, develop a sense of accomplishment and, as members of the community, benefit from improvements to the agency to which they are loaned.

In reply, the Coalition denies that the rate effect of charitable contributions is as inconsequential as the company asserts and suggests that if these expense were so inconsequential, the company would not work so hard to shift their cost to its customers. Staff, meanwhile, notes that the company's arguments against continued application of the benchmark are the same as those we considered and found unpersuasive in the company's last rate case.[2] It also denies the company has refuted the Judges' distinction between indirect support of the Telephone Pioneers of America and direct support of the other assertedly "employee-related" programs. The benchmark, staff concludes, should be applied to all these expenses because they provide no greater employee benefit than any other charitable contribution.

On exceptions, staff also continues to press for a 12% reduction to the inflation adjusted 1969 benchmark to reflect "the impact of divestiture upon the size of NYT's operations."[3] According to staff, the 1969 level of contributions intrinsically reflects the company's size, and an adjustment, based on the reduction in TPIS due to divestiture, thus is warranted to account for the company's significant loss of operations. It sees the lack of a direct tie between TPIS and the charitable contribution benchmark as beside the point, because circumstances warranting such a comparison never arose previously. It contends we would clearly make an adjustment to the benchmark if the company lost, say, 95% of its operations and related TPIS, and it argues that the same logic supports adoption of its 12% reduction to the benchmark.

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[2] Case 28264, *supra,* Opinion No. 83-11, mimeo p. 120.

[3] Staff's Brief on Exceptions, p. 45.

The company replies that the benchmark had no relation to TPIS and that the needs of the communities and customers it serves are unchanged despite the reduction in TPIS. Staff's argument from the extreme case of a 95% reduction in operations and related TPIS is misplaced, according to the company, because though divestiture has reduced TPIS, it has left the company with the same service area, customer body, and community and charitable needs.

As staff suggests, we previously considered and found inadequate the company's reason for discarding the inflation adjusted benchmark. We see no reason to depart from that precedent, and we reject that part of the company's exception.

Whether the company's loan of employees program, matching gifts program, and Summer Arts Festival contributions are more like charitable contributions generally, or more like expenses incurred in connection with the Telephone Pioneers of America, is a question of degree, and we find the Judges' analysis of the issue to be reasonable. Indeed, adopting the company's argument could result in total abandonment of the benchmark, for almost any contribution could be said to improve employee morale to some degree. Accordingly, this aspect of the company's exception is denied as well.

Finally, the company now has the same service territory, customers, and communities to serve as it did before divestiture. Staff's exception therefore is denied, though we do not reach the issue of how we would respond in the more extreme case hypothesized by staff.

Regulatory Decisions

Excerpt from *Re New York Telephone Co.*, 10 N.Y. P.S.C. 345, 378-79, 84 PUR 3d 321, 349-50 (1970).

Charitable Contributions

NYT deducted as an operating expense an amount of $901,315 expended during the test year as charitable contributions. Of this amount, more than one-half, $467,251 was made to the United Appeal and Red Cross. The balance was made up of donations to hospitals, educational institutions, and other charitable, social, and community welfare organizations. NYT contends that it and its employees benefit directly from the activities of the beneficiaries of its contributions and that it should be permitted to treat these expenditures as operating expenses for ratemaking purposes, as it does for Federal income tax purposes. In the past, this Commission has not permitted regulated utilities to include charitable contributions as an operating expense on the ground they are not necessary to the conduct of the business and that they are made at the sole discretion of Company officers to donees of their choosing. The proposed report, while making clear that the organizations to which the contributions had been made were worthy of support, disallowed the charitable deductions as an authorized expense on the basis of Commission precedent.

The Federal Government permits charitable contributions by a corporation to be deducted for tax purposes. As a result, the actual cost to the Company's customers is approximately one-half of the amount of the contributions. The Company, in protesting the disallowance, points out that the Illinois Commerce Commission has accepted charitable contributions as a proper operating expense.[22] The

[22] *Vrtjack v. Ill. Telephone Co.*, 32 PUR 3d 385, 387-388 (1959).

Federal Power Commission also has allowed such contributions to be included in the cost of servicing, stating:[23]

> ". . . We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Corporations throughout the country have come to realize that charitable contributions are no longer wholly voluntary. Most charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share of the funds needed to carry on their necessary community activities. We believe it is time that the Commission reconsidered its past position with regard to charitable contributions by utilities and, on such reconsideration, we conclude that the contributions made by NYT and reflected in this proceeding should be allowed as a proper operating expense.* We have examined the individual items and find that the Company has exercised prudence both as to the recipients of its contributions and in the amounts donated. We are prepared to examine carefully claims for charitable contributions by other public utilities and to recognize similar donations in a reasonable amount. However, we emphasze that it is not our

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[23] *United Gas Pipe Line Co.*, 31 FPC 1180, 1189; 54 PUR 3d 285, 295 (1964).

* *Editor's Note:* See interim report, Feb. 11, 1970, p. 88.

function to screen lists of contributions, to pick out the good from the bad, and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in whch they were not considered allowable expenses will serve as a benchmark for the future.

Respondent Cahill's Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

Index No.

VERIFIED PETITION PURSUANT TO ARTICLE 78, C.P.L.R. TO REQUIRE RESPONDENTS TO TERMINATE THEIR POLICY OF PERMITTING UTILITIES TO CHARGE CUSTOMERS FOR CHARITABLE CONTRIBUTIONS

PRELIMINARY STATEMENT

1. The New York State Public Service Commission has a well-established policy of allowing the utilities it regulates to pass on as rate charges to their customers donations to religious and other charitable organizations. Customers are not given any choice to determine the recipients of these donations under Respondents' policy. Petitioner challenges this policy solely on the ground that it violates his First Amendment rights of free expression, free exercise of religion and against establishment religion. He seeks an order precluding future implement of this policy.

Respondent Cahill's Petition

PARTIES

2. Petitioner Joseph Cahill is a 63-year old United States citizen who is a resident of Dutchess County. Petitioner has lived in the town of Fishkill for the past 25 years and was an IBM project manager prior to his retirement which resulted from disability. Petitioner Cahill is a practicing Roman Catholic.

3. The Respondents are the New York State Public Service Commission and its members and are proceeded against here only in their capacity as policy-makers and only insofar as they are directly responsible for the policy challenged by the Petitioner. The Respondents' duties include fixing rates for all public utilities in New York State and as such it is their policy to pass on the cost of charitable donations by the utilities to the customers rather than to require the stockholders of these utilities to bear the burden of charitable donations. The Respondents' policy does not provide any opportunity for customers who object to the recipients of these donations to withhold or otherwise indirect such donations.

FACTUAL ASSERTIONS

4. Prior to 1970, the Respondents did not include charitable donations as a cost of doing business in fixing the rate structures of New York State public utilities. Beginning 1970, however, this policy changed and Respondents have consistently authorized expenditures for charitable donations in accordance with their policy as described in paragraph 3 and the proposed tariffs submitted by the utilities in the rate setting process.

Respondent Cahill's Petition

5. The amount of charitable donations authorized for each utility by the Respondents is set pursuant to a formula based upon the rate of inflation and the amount of charitable donations of each utility prior to the 1970 implementation of the Respondents policy of allowing utilities to charge customers for charitable donations.

6. On June 22, 1984, Respondents specifically authorized New York Telephone Company to charge its customers, one of whom is Petitioner, for its charitable donations at approximately $3,000,000 in 1984. That determination became final on October 10, 1984. Thereby, Respondents authorized the New York Telephone Company to make charitable donations to several thousand charities. Among these are several which either are themselves or support, religious institutions of faiths which expound beliefs inconsistent with the Petitioner's belief and practice of Catholicism. Also, among these charities are several which support the right to an abortion to which the Petitioner objects on moral and religious grounds. And, finally, among these charities there are several which support activities and causes to which Petitioner objects on political or personal grounds.

7. Petitioner objects as a matter of principle to being compelled to support these charities in particular, and all charities in general, by means of including coerced contributions in his utility bills no matter how small a portion his bill is affected by Respondents' policy. Petitioner has never been informed either by Respondents or by the utilities which serve him of the fact that a portion of his utility payments are being diverted to charities. Further, Petitioner has never been informed of the specific charities to which this portion of his payments are being diverted. Finally,

Respondents have failed to adopt any procedure which would allow Petitioner to withhold his contribution or redirect his contribution to organizations to which he does not object.

8. Respondent permits the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests of the customers.

9. Plaintiff has no alternative means of obtaining the basic utility services which the New York Telephone Company provides him in his home geographic area.

10. No previous application for the same or similar relief has been made except that an action in the Southern District of New York was filed on August 1, 1984, and subsequently dismissed upon the stipulation of the parties because the federal courts lack jurisdiction over challenges to rate orders under 28 U.S.C. § 1342.

CAUSE OF ACTION

11. Based upon paragraphs 1-10 above, the Respondents have denied Petitioner the rights to free expression and free exercise of religion as well as against establishment of rligion under the First Amendment of the United States Constitution.

WHEREFORE the Petitioner respectfully prays that this Court

a) Enter an order directing the Respondents to adopt a policy of setting utility rates which eliminates the practice

of charging utility customers for the charitable contributions made by utilities;

b) Enter an order vacating the Respondents' rate order of June 22, 1984, with the direction that such rate order be amended to eliminate authorization for charging New York Telephone customers for the charitable contributions which that utility makes;

d) Enter an award of attorneys' fees and costs in favor of the plaintiff pursuant to 42 U.S.C. § 1998.

e) Grant such other relief as the Court deems necessary and appropriate.

Dated: October 16, 1984
New York, New York

/s/ RICHARD EMERY, ESQ.
Richard Emery, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011
212-924-7800

Attorney for Plaintiff

Verification of Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No.

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION, ET AL.,

Respondents.

VERIFICATION OF PETITION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, Joseph Cahill, being first duly sworn, depose and say I have read the Petition Pursuant to Article 78, C.P.L.R., made in my name against the Public Service Commission, its Chairman and Commissioners. The allegations contained therein are true of my own personal knowledge, except for those statements made on information and belief and as to those I have reason to believe they are true.

Further deponent saith not.

/S/ JOSEPH E. CAHILL
Joseph E. Cahill

Sworn to before me this
16th day of October, 1984.

/S/ RICHARD EMERY
Notary Public

Public Service Commission Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID E. BLABEY, being duly sworn, deposes and says:

1. I am Counsel to the Public Service Commission of the State of New York and the attorney for the respondents in the above-entitled action. I make this affidavit in support of the respondent's motion to dismiss.

2. This action was commenced by service of a petition and notice of petition on the Commission on October 19, 1984.

3. The petition alleges that the Public Service Commission, beginning in 1970, authorized expenditures for char-

itable donations by New York State utilities through the rate setting process. This policy purportedly violates the First Amendment rights of freedom of expression and association and against establishment of religion.

4. The petition asks the Court to direct respondents to adopt a policy excluding charitable donations from utility rates, to find inclusion of such donations in rates unconstitutional, to vacate the respondent Commission's rate order of June 22, 1984, with the direction that such rate order be amended to eliminate from rates amounts attributable to charitable contributions made by the New York Telephone Company, and to award the plaintiff his attorney's fees and costs.

5. New York State utilities have made charitable contributions for many years. Charitable contributions are considered a legitimate cost of doing business and, therefore, constitute a proper ratemaking expense. Upon information and belief, New York charities receive and depend on substantial utility donations.

6. The Public Service Commission first permitted New York utilities to include in rates a reasonable allowance for charitable donations in 1970. New York Telephone Company, Case 25155, 84 P.U.R.3d 321 (1970). A copy of the relevant portions of this order is attached hereto as Exhibit A.* The Commission, however, has never *ordered* utilities to make charitable contributions generally or religious donations secifically. While it has allowed charita-

* Exhibit A has not been separately reproduced in this Appendix. The excerpts from Case 25155 contained in Exhibit A appear in the Appendix at pp. A45-47.

ble contribution expenses to be included in estimates of utility expenses, the Commission has never interfered with the utilities' selection of donees. And, upon information and belief, no party in a Commission proceeding has ever challenged allowances for charitable donations expenses on religious or freedom of expression grounds.

7. In Case 28601, the most recent case setting rates for New York Telephone Company, the Commission continued to allow charitable contribution expenses to be used to determine that company's revenue requirement. New York Telephone's charitable contribution rate allowance was computed by using its level of contributions in 1969 as a benchmark, with an adjustment for inflation since that date. If the company makes contributions in excess of this adjusted benchmark, that expense will be shouldered by its stockholders. A copy of the relevant portions of Opinion No. 84-16 in Case 28601 is attached hereto as Exhibit B.*

8. The Commission, therefore, does not intrude upon the utilities' discretion in making contributions. The utilities select which organizations shall receive contributions and the amount of each contribution. The utilities may choose to make no contributions or contributions in excess of the amount allowed in rates. Of course, if a company does not make contributions in a given test period, it will likely not receive a rate allowance for contributions expenses in its next rate decision.

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* Exhibit B to this affidavit has not been separately reproduced in this Appendix. The portion of Opinion 84-16 which are contained in Exhibit B appear in this Appendix at pp. A40-44.

Public Service Commission Affidavit in Support of Motion to Dismiss

THE COURT HAS NO SUBJECT MATTER JURISDICTION BECAUSE THE PUBLIC SERVICE COMMISSION HAS EXCLUSIVE PRIMARY JURISDICTION OVER THE REASONABLENESS OF UTILITY RATES

9. The Commission is empowered under Public Service Law Sections 91 and 92 to set "just and reasonable" utility rates. This jurisdiction is exclusive and supersedes all common law remedies of the customer against the company. *Purcell* v. *New York Central Railroad Company*, 268 N.Y. 164 (1935), cert. denied, 294 U.S. 574.

10. Courts have recognized the Commission's exclusive, original jurisdiction over rates. As one court has stated:

> Tariffs on file with the Public Service Commission are presumed to be reasonable and must be attacked in the first instance before the Public Service Commission (*People ex rel. Public Serv. Comm. of State of N.Y.* v. *New York Tel. Co.*, 262 App. Div. 440, 444, affd. 287 N.Y. 803). Where the reasonableness of a public utilitie's practices is challenged, the doctrine of primary administrative jurisdiction is applicable, and the Public Service Commission is the proper body to pass on the question of reasonableness (Matter of *Leitner* v. *New York Tel. Co.*, 227 N.Y. 180, 189, mot. for rearg. den 278 N.Y. 598; *Freedom Fniance Co.* v. *New York Tel. Co.*, 29 A.D. 2d 545; *Murray* v *New York Tel. Co.*, 170 App. Div. 17, affd. 226 N.Y. 590). *Van Dussen-Storto* v. *Rochester Telephone Co.*, 42 A.D. 2d 400, 402 (1973).

Public Service Commission Affidavit in Support of Motion to Dismiss

11. The rate treatment of charitable contributions expenses constitutes an integral part of the ratemaking function. Any challenge to this function, including a claim of violation of a constitutional right, should be initially addressed to the Commission. See *Karp* v. *Consolidated Edison Co. of NY,* Slip Opinion No.'s 71 and 151 (Sup. Ct. New York Co., September 26, 1984, Edwards, J.) (A copy of this opinion is attached hereto as Exhibit C).

12. The issue of the constitutionality of the Commission's contributions practice under the First Amendment has, to the best of my knowledge, never been raised before the Commission. Because the Commission has exclusive primary administrative jurisdiction over claims which affect the reasonableness of rates, petitioner's claim should not be heard by the court until it has been heard and decided by the Commission.

13. Parties other the than petitioner did raise objections to the charitable contributions practice in Case 28601. These challenges, however, were not based on alleged violations of the First Amendment. Thus, the question raised in the petition, which is essentially a ratemaking issue, has never been raised before the Commission, which, again, has primary jurisdiction of the ratemaking process.

THE PETITION SHOULD BE DISMISSED BECAUSE THE PETITIONER HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

14. The doctrine of exhaustion of administrative remedies relieves the courts of deciding questions entrusted to administrative agencies, prevents premature judicial inter-

ference with administrative expertis, allows agencies to develop coordinated and consistent policies and affords the opportunity to prepare a complete record. *Watergate II Apts.* v. *Buffalo Sewer Authority,* 46 N.Y. 2d 52 (1978); *YMCA* v. *Rochester Pure Waters Dist.,* 37 N.Y. 2d 371 (1975).

15. An exception to the exhaustion doctrine exists where an agency's action is challenged as unconstitutional. *Watergate II Apts.* v. *Buffalo Sewer Auth.,* supra. This exception, however, is not applied automatically. Where the legislature has declared that a particular subject matter should be dealt with administratively, a claim must first be heard before the specified agency, notwithstanding the presence of a constitutional issue. *Matter of Patterson* v. *Smith,* 53 N.Y. 2d 98 (1981). The assertion of a constitutional claim also will not excuse a failure to exhaust if the administrative agency can provide adequate relief. *Matter of Pfaff* v. *Columbia-Green Community College,* 99 A.D. 2d 887 (1984).

16. Exceptions from the exhaustion doctrine are appropriate where the constitutional claim, such as a challenge to an agency's enabling statute, cannot be fully resolved by the agency. Where, however, the legislature has delegated responsibility over a particular subject matter to an agency and the agency is empowered to provide adequate relief, the exhaustion doctrine applies.

17. The doctrine has been invoked to dismiss an action where parties appeared before the Commission to challenge the reasonableness of the charitable contribution practice, but resorted to the courts before completing procedures before the Commission. *Stein* v. *Kahn,* Slip Opinion No. 48

(Sup. Ct. Albany County, June 24, 1977, Pitt, J.) (A copy of this opinion is attached hereto as Exhibit D).*

18. The legislature has delegated the ratemaking function to the Commission, which has developed extensive procedures for resolving ratemaking issues. The constitutional challenge to the contributions practice does not implicate statute or regulation. Rather, the challenge is to the Commission's own administrative decision, which the Commission can reverse if it decides that a conflict with the First Amendment exists. Therefore, the factors favoring application of the exhaustion doctrine outweigh factors favoring application of the exception to the doctrine.

THE PETITIONER HAS FAILED TO STATE A CLAIM UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

19. Petitioner challenges the Commission's charitable contributions practice as violative of the First Amendment, as applied to the state through the Fourteenth Amendment. A finding of "state action" is a pre-requisite to any action brought under the Fourteenth Amendment. *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). State action is not present here.

20. The Commission-regulated utilities whose rates include charitable contributions are all privately owned and operated. The United States Supreme Court has expressly held that extensive regulation of a privately-owned utility

* Exhibit D has not been reproduced in this Appendix.

does not transform the policies of the utility into state action.

> [T]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the state itself. . . . Approval . . ., where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." (Emphasis added) *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351, 357 (1974).

21. Constitutional standards can be invoked under the state action doctrine only when "it can be said that the state is *responsible* for the specific conduct of which plaintiff complains." (Emphasis in original). *Blum* v. *Yaretsky*, 457 U.S. at 1004. A regulation requiring state approval of a person before hiring also is "not sufficient to make a decision to discharge, made by private management, state action." *Rendell-Baker* v. *Kohn*, 457 U.S. at 842.

22. At most, the Commission's practice of allowing a contributions expense in rates recognizes that charitable contributions are a legitimate cost of doing business. However, State approval of rates to support a private act, such as the act of an investor-owned utility, is not state action. "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute

without any approval." *Cochran* v. *Public Service Commission of Oklahoma,* 421 F. Supp. 17, 19 (N.D. Okla. 1976). That court then held that such approval of a business practice did not constitute state action. *Id.* The Court of Appeals for the Second Circuit has also held that the business decisions of a regulated, privately-owned utility do not constitute state action, even though the utility is a monopoly. *Taylor* v. *Consolidated Edison Co. of N.Y.,* 552 F. 2d 39, 46 (2d Cir. 1977).

23. State courts have consistently followed this principle. In *Montalvo* v. *Consolidated Edison Co. of N.Y.,* 92 A.D. 2d 389, 395 (1983), aff'd 61 N.Y. 2d 810, the court "rejected the contention that the monopoly status of the utility made its actions attributable to the state."

24. Another New York State court has previously dismissed a First Amendment challenge to the contributions practice because the court could not find state action. *Karp* v. *Consolidated Edison Co. of N.Y.,* Slip Opinion at 3 (Exhibit C). The court stated that:

> With respect to the cause of action . . . based on an alleged violation of First Amendment guarantees, the court finds no basis upon which such cause can be sustained. The purported claim . . . does not lie because the essential element of "state action" is missing. "State action" is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the act complained of (see *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351). The Commission has stated that the practice of making

charitable contributions is purely a matter of the utility's discretion. (See Montalvo v. Con Edison, 92 AD 2d 389, 394; New York Telephone Co., supra, pp. 8-83). It is clear that the Commission does not compel the contributions nor, does it designate a particular charity or the amount of the contribution to be made. *Id.*

25. Petitioner has asserted that the Commission's rate allowance for charitable contributions compels him to finance the such contributions against his will, because the utility is his sole source of an essential service. His argument is based on an attempt to analogize his situation to that of the plaintiffs in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 2909 (1977). In *Abood*, the plaintiffs were forced by statute to associate against their will with a union. *Id.* at 218 n.12, 226. The Comission's rate policy involves no such compulsion because a regulated utility does not represent its customers' views and opinions. The relationship between the two is economic only. *Abood* and its progeny are, therefore, clearly distinguishable from this case.

WHEREFORE, deponent respectfully asks for a judgment dismissing the complaint in the above-titled action.

/s/ DAVID BLABEY
David Blabey

Sworn to before me this
3rd day of December, 1984

/s/ LEONARD J. VAN RYN
Notary Public

Exhibit C to Commission Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special Term—Part I

Index Nos. 80843/84 11127/84
No. 71 of 5/24/84
No. 151 of 5/24/84

RICHARD KARP, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and NEW YORK STATE PUBLIC SERVICE COMMISSION,

Defendants.

EDWARDS, J.:

Motions numbered 71 and 151 on the Special Term, Part I Calendar of May 24, 1984 are consolidated for disposition and are decided in accordance with the following memorandum decision.

These motions, brought by defendants Consolidated Edison Company of New York, Inc. ("Con Ed") and the New York State Public Service Commission ("the Commission"), respectively, seek dismissal of the complaint on substantially identical grounds. The basis for dismissal are that the court lacks subject matter jurisdiction over the monetary claims asserted against the Commission, failure to state a cause of action under Sections 65 and 66 of the

Exhibit C to Commission Affidavit in Support of Motion to Dismiss

Public Service Law and under Title 42 U.S.C., Section 1983, that this action, improperly denominated a class action seeking declaratory and injunctive relief, is time-barred pursuant to CPLR 217 and 3211(a)(5) and, that the court lacks subject matter jurisdiction due to the exclusive primary jurisdiction of the Public Service Commission.

The gravamen of the complaint is that Con Edison's inclusion of charitable contributions made as part of its operating expenses for the purpose of rate-making during the period April 17, 1978 to April 17, 1984, as approved by the Commission, is unlawful and violates Sections 65 and 66 of the Public Service Law which requires utilities to provide safe and adequate service at "just and reasonable" rates. Additionally, the complaint alleges that because the Commission has approved Con Edison's inclusion of donations made to religious organizations in its rates, such permission or approval constitutes "state action" within the meaning of Title 42 U.S.C., Section 1983 and is a violation of the First Amendment guarantee against the establishment of religion.

Turning to the requested relief, the court finds that these motions involve exclusively matters of law and are, therefore, appropriate for summary judgment.

Since 1970, it has been the established policy of the Public Service Commission to approve the practice of inclusion of charitable contributions as an element of operating expense by a public utility on the ground that such expenses are "just and reasonable" utility operating expenses (New York Telephone Company, 84 P.U.R. 3d 321, 349). Since that time, in an unbroken line of decisions the Commission has concluded that charitable con-

tributions, in moderate amounts, are "just and reasonable" utility operating expenses. While individual Commissioners have dissented from that policy in various rate cases and while bills have been introduced in the State Legislature, though never passed, to prohibit rate recovery of charitable contributions, there is nothing found in the Public Service Law which prohibits utilities from recovering such expenses, if approved by the Commission as "just and reasonable." Indeed, the propriety of the policy was approved by this court in Stein v. Kahn, Slip Op. No. 48 (Sup. Ct., Albany Co., June 10, 1977, Pitt. J.). The court, in considering an identical challenge to charitable contributions made by Con Ed, observed that the practice is authorized by Business Corporation Law, Section 202(a)(12) which governs Con Ed's operations as an inventor-owned utility.

With respect to the cause of action asserted pursuant to 42 U.S.C., § 1983 and based on an alleged violation of First Amendment guarantees, the court finds no basis upon which such cause can be sustained. The purported claim for alleged civil rights' violation does not lie because the essential element of "state action" is missing. "State action" is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the act complained of (see Jackson v Metropolitan Edison Co., 419 U.S. 345, 351). The Commission has stated that the practice of making charitable contributions is purely a matter of the utility's discretion. (see Montalvo v Con Edison, 92 AD 2d 389, 394; New York Telephone Co., supra, pp. 81-83). It is clear that the Commission does not compel the contributions nor, does

it designate a particular charity or the amount of the contribution to be made.

Addressing the subject matter jurisdiction issue, the court concludes that the doctrine of exclusive primary administrative jurisdiction deprives the court of subject matter jurisdiction over those portions of the complaint which seek monetary damages. The court comes to this conclusion based upon a recognition that the contributions complained of constitute an integral part of the rate-making function of the Commission and, therefore, any challenge to the exercise of this administrative function should be, in the first instance, addressed to the particular administrative body involved (Van Dussen-Storto v Rochester Telephone Co., 42 AD 2d 400, aff'd 34 NY 2d 904). Therein, the court stated that:

> ". . . the statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and s supercede all commonlaw remedies . . . the Commission has exclusive original jurisdiction over public utility rates. . . ." (supra, at p. 403).

Even more important, by legislative enactment, the court has no jurisdiction over the monetary claims asserted against the Commission, since such entity is a State agency (Court of Claims Act, Sections 8 and 9[2]).

Finally, the court finds that this action has been improperly brought as a class action suit; apparently, in an effort to avert the consequences of the statute of limitations.

Plaintiff argues that the Commission's rate determinations are "legislative" in nature and, therefore, reviewable only in an action for declaratory relief under a six-year

statute of limitations [CPLR 213(1)]. However, the court finds this argument lacks merit. It is clear that plaintiff challenges the determination of the Commission in its rate-making function, as such it has been consistently held that all such obligations must be brought pursuant to CPLR article 78 (Abrahams v Consolidated Edison of New York, Inc. 95 AD 26 906) and within the applicable four-month statute of limitations (CPLR 217). If the four-month statute of limitations is applied, this action must be dismissed as untimely (see Solnick v. Whalen, 49 NY 2d 224).

Accordingly, the motions for dismissal of the complaint and directing the entry of judgment in defendants' favor are granted.

Dated: Sep. 26, 1984

/s/ (Illegible)
J. S. C.

New York Telephone Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF NEW YORK TELEPHONE COMPANY'S CROSS-MOTION TO DISMISS THE PETITION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GERALD E. MURRAY, being duly sworn, deposes and says:

1. I am admitted to the bar of the courts of the State of New York and am one of the attorneys for New York Telephone Company (the "Company") in this proceeding and am familiar with the facts relating to the proceeding.

2. I make this affidavit in support of the Cross-Motion of the Company to dismiss the petition herein pursuant to CPLR §§ 2215, 3211(a).

New York Telephone Affidavit in Support of Motion to Dismiss

3. As shown in the annexed brief, the petition should be dismissed because:

- o The Court lacks jurisdiction over the subject matter of the petitioner's cause of action. CPLR § 3211(a)(2);
- o The petition fails to state a cause of action. CPLR § 3211(a)(7);
- o The petitioner's cause of action may not be maintained because of the statute of limitations. CPLR § 3211(a)(5).

As also shown in the annexed brief, if the petition is not dismissed, the Court must, pursuant to CPLR § 7804(g), transfer the matter to the Appellate Division, Third Department.

4. The petitioner states that he is a customer of the Company. Petitioner requests an order pursuant to CPLR Article 78 directing respondents to vacate the Public Service Commission's June 22, 1984 *New York Telephone Company* Rate Case Order (Case 28601, — N.Y.P.S.C. —) and amend that Order to eliminate authorization for the Company charging customers rates which recover the Company's charitable contributions; and directing the Commission to adopt a policy which eliminates the practice of charging utility customers rates which recover the charitable contributions made by utilities. Petitioner also seeks an award of attorney's fees and costs.

5. Petitioner argues that the reflection of charitable contributions in utility rates violates petitioner's First Amendment rights of free expression, free exercise of religion and against establishment of religion.

New York Telephone Affidavit in Support of Motion to Dismiss

6. While the petition should be dismissed and accordingly the Court should not reach the merits of the petition at this time, the following facts are important in placing the matter of the petition in proper perspective.

7. The Company's rates for telephone service are fixed by the Public Service Commission (the "Commission") in the manner prescribed by Article 5 of the Public Service Law. In general, Article 5 requires the Commission, after public hearings, to fix utility rates that are "just and reasonable" to the utility and its customers. Public Service Law §§ 91-92, 97. In this process, the Commission sets rates that are designed to give the utility an opportunity to recover its reasonable expenses incurred in providing utility service.

8. Since 1970, the Commission's policy has been to permit utilities to reflect in rates a certain level of contributions made by utilities to charitable organizations on the ground that such expenses are "just and reasonable" utility operating expenses. In announcing its policy in a *New York Telephone Company* rate case, the Commission stated:

> "We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Case 25155, 10 N.Y.P.S.C. 345, 378, 84 P.U.R.3d 321, 349 (1970), quoting from *United Gas Pipe Line Co.*, 31 F.P.C. 1180, 1189, 54 P.U.R.3d 285, 295 (1964).

9. In an unbroken line of decisions since that time, the Commission has concluded that charitable contributions, in moderate amounts, are "just and reasonable" utility operating expenses that should properly be recovered in rates. Bills have been introduced in the State Legislature to prohibit rate recovery of contributions, but these bills have never passed.

10. The Commission has carried out its ratemaking policy as to contributions in the following manner. Consistent with the Commission's policy of determining utility rates based on forecasts of all utility operating expenses during what is known as a "future test year," the Company presents in its rate cases a forecast amount of charitable contributions to be made in the future test year. The Commission allows the level of charitable contributions reasonably forecast by the Company, provided that the forecast level does not exceed the benchmark level of the Company's contributions prior to 1970—that is, prior to the time the Commission began to permit rate recovery of these expenditures—adjusted for inflation as measured by the Consumer Price Index, and provided that the contributions are not demonstrably imprudent.

11. The charitable contributions reflected in the Company's most recently concluded rate case (Case 28601—the case addressed by petitioner), in which petitioner did

not participate, were set in this manner by the Commission.[1] Petitioner states, incorrectly, that it is the Commission's policy to have the Company's customers bear the entire cost of the Company's contributions. Memorandum in Support of Petition, p. 2. In Case 28601, the Company projected it would make $6.5 million in charitable contributions in the future test year. The Commission allowed only $2.1 million of those contributions to be recovered in rates (*see* Appendix A);* further, the Commission reduced the rate award to reflect the Federal income tax-reducing effect of the Company's deduction of charitable contributions. Thus, the Commission's policy has been such that the Company's stockholders bear a very substantial portion of the Company's charitable contributions expense.

The Commission held in its Case 28601 rate case order (p. 57):

> "Here, as on numerous prior occasions, we reject the consortium's claim that all charitable contributions must be disallowed, because we have long held that the company's legitimate, necessary expenditures include such contributions unless they are demonstrably imprudent."

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[1] Appendix A to this Affidavit includes a copy of the portion of the Commission's June 22, 1984 Opinion and Order in Case 28601 relating to contributions.

Petitioner states that he has not been informed that the Company's rates reflect a portion of the Company's charitable contributions. Petition, p. 3. However, in the Company's rate cases the public has always been provided full notice and opportunity to be heard on any issue, including charitable contributions.

* The Appendices to this Affidavit have not been reproduced in this Appendix. The portions of Appendix A to this Affidavit which are excerpts from the Commission's decision in Case 28601 appear at pp. A40-44 of the Appendix.

Whereas petitioner alleges that the Company's contributions are not "germane" to its utility service (Memorandum in Support of Petition, pp. 7, 11), the uncontested evidence in Case 28601 demonstrated that the Company's contributions benefit the Company's ratepayers in a number of ways and are an integral cost of the Company's utility business. The evidence demonstrated, *inter alia,* that the Company's contributions: aid public services that the Company might otherwise have to incur costs to provide; contribute to producing quality managers of the Company's business; improve the economic, social and political environment in the Company's operating territory, thus enabling the Company to attract and retain qualified employees, improve productivity, hold cost increases to the lowest possible level, and attract new business and promote residential growth, thus leading to a healthier market and expanding revenues for the Company. Transcript pages 3397-98 in Case 28601, included in Appendix B hereto.*

12. Several aspects of the Commission's ratemaking procedure with regard to contributions should be emphasized.

First, the Commission has not compelled any utility to make *any* charitable contributions, let alone a particular level of such contributions. *See* also Affidavit in Support of Public Service Commission's oMtion to Dismiss, p. 2. The Commission's policy has consistently been to permit rate recovery of a forecast level of contributions, so long as the forecast level does not exceed the pre-1970 benchmark amount adjusted for inflation, and the contributions are not

* Appendix B is not reproduced in this Appendix.

demonstrably imprudent. The expense of any contributions over that adjusted benchmark and within the Commission's jurisdiction is borne by the Company's shareholders. The Company would be free under the Commission's policy to make no charitable contributions whatsoever.

Second, the Commission has consistently declined to designate the organizations to which such contributions should be made. The Commission's explicit policy has been that charitable contributions are made pursuant to "an exercise of discretion by the company" rather than a directive from the Commission. *E.g., New York Telephone Company,* PSC Case Nos. 27710, 27651, Slip Opinion No. 81-3, January 19, 1981, pp. 72-73.

Third, the Company does not provide funding for religious organizations when denominational or sectarian in purpose.

Fourth, the Commission's policy on contributions has already withstood judicial review. In 1977, this Court (Justice De Forest C. Pitt) dismissed an Article 78 proceeding to review the Commission's policy on the ground that the petitioner had not exhausted his administrative remedies and on the further ground that, given the provision of the New York Business Corporation Law permitting utilities to make charitable contributions (B.C.L. § 202(a)(12)), the Commission did not act unlawfully in permitting recovery of charitable contributions. *Stein* v. *Kahn,* Slip Op. No. 48 (Sup. Ct. Albany County, June 10, 1977). (A copy of this decision is included as Ex. D to the Affidavit of the Commission in support of its motion to dismiss.)

New York Telephone Affidavit in Support of Motion to Dismiss

And, as recently as September 26, 1984, the New York Supreme Court, County of New York (Edwards, J.) ordered dismissal of an Article 78 proceeding challenging the Commission's contributions policy on First Amendment grounds, the same grounds invoked by petitioner. *Karp* v. *Consolidated Edison Co. of N.Y.*, Index Nos. 80843/84, 11127/84. (A copy of this decision is attached as Ex. C to the Affidavit of the Commission in support of its motion to dismiss.) The court observed, *inter alia,* that it lacked subject matter jurisdiction because state action was not present and because of the exclusive primary jurisdiction of the Commission. These court decisions are addressed in more detail in the annexed brief.

WHEREFORE, it is respectfully requested that the Court granted judgment dismissing the Article 78 petition.

/s/ GERALD E. MURRAY
Gerald E. Murray
Attorney for
New York Telephone Company

/s/ MIGUEL A. ROSA
Notary Public

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WALTER A. BOSSERT, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Gould & Wilkie, counsel to Central Hudson Gas & Electric Corporation ("Central Hudson"), and make this affidavit in support of Central Hudson's motion to dismiss this proceeding pursuant to Section 3211(a) of the Civil Practice Law and Rules ("CPLR").

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

2. This proceeding was commenced by service of a notice of petition and verified petition, attached hereto as Exhibit A, on October 19, 1984.*

3. This is a special proceeding brought under Article 78 of the CPLR by an individual against the Public Service Commission of the State of New York ("PSC") and its individual commissioners for the purposes of obtaining an order of the Court to the principal ends of:

> (a) vacating the PSC's rate order of June 22, 1984, which order authorized rates permitted to be charged by New York Telephone Company; and directing that such rate order be amended to eliminate authorization for charging customers of New York Telephone Company for the charitable contributions which that utility makes; and
>
> (b) directing the PSC to adopt a policy excluding charitable donations made by utilities from its customers through rates;

the crux of petitioner's case being that the policy of the PSC permitting inclusion of such donations in utility rates is unconstitutional as a violation of a utility ratepayer's rights of freedom of expression, free exercise of religion and against establishment of religion which are guaranteed under the First Amendment to the Constitution of the United States of America, on the principal grounds that, under the policy of the PSC, customers of utilities are not given any choice to determine the recipients of the donations made by the utility, or to withohld donations from or to redirect donations to charities of their choosing.

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* Mr. Cahill's petition appears at pp. A48-53 of this Appendix.

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

4. Central Hudson is a corporation formed under the Transportation Corporations Law of the State of New York to provide electric and gas service within its service territory located in the mid-Hudson River Valley region of New York State. It is a gas and electric corporation within the meaning of the Public Service Law, and, as such, its rates, charges and practices are subject to the jurisdiction and approval of the PSC. The policy of the PSC first expressed in its 1970 New York Telephone Company rate order (New York Telephone Company, Case 25155, 84 P.U.R. 3rd 321 (1970)) of considering charitable donations to be proper business expenses when establishing the reasonableness of utility rates is applicable equally to Central Hudson as it is to New York Telephone Company and to all other utilities in New York State which are subject to the jurisdiction of the PSC. Pursuant to such policy of the PSC, in determining the reasonableness of Central Hudson's rates, the PSC has considered charitable donations to be reasonable business expenses.

I. THE PETITION SHOULD BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER RAISED IN THE PETITION (CPLR 3211(a)(2)).

A. The Petition Should Be Dismissed Because the PSC Has Exclusive Primary Jurisdiction Over the Reasonableness of Utility Rates.

5. The petition should be dismissed because the PSC has exclusive primary jurisdiction over the reasonableness of utility rates. Public Service Law, § 66(12).

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

B. The Petition Shoud Be Dismissed Because the Petitioner Has Failed To Exhaust His Administrative Remedies.

6. Upon information and belief, petitioner herein has never requested the PSC to pass upon the validity or applicability of the policy of the PSC first expressed in its 1970 New York Telephone Company rate order (New York Telephone Company, Case 25155, 84 P.U.R. 3rd 321 (1970) of considering charitable donations to be proper business expenses when establishing the reasonableness of utility rates nor the validity or applicability of permitting recovery in rates charged to customers of New York Telephone Company's costs associated with charitable donations made by New York Telephone Company authorized in its most recent rate case before the PSC (Case 28601), Opinion 84-16, dated June 22, 1984).

7. The PSC has, in 16 NYCRR § 9.1, prescribed a procedure for rendering declaratory rulings under Section 204 of the State Administrative Procedure Act ("SAPA") with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it.

8. The failure of petitioner to so request the PSC to pass upon the validity or applicability of the rates established in PSC Cases 25155 and 28601 contravenes the express requirements of SAPA § 205, which specifies that a special proceeding may not be maintained unless the petitioner has first so requested the agency to render a declaratory ruling with respect thereto. Petitioner's failure to so request constitutes an absolute bar to his bringing this proceeding (SPA § 205), and accordingly, the court should

dismiss this proceeding for lack of subject matter jurisdiction (CPLR 3211(a)(2)).

9. Upon information and belief, petitioner herein never appeared before the PSC in Case 25155 nor in Case 28601, although public notice of each proceeding was duly given; and, accordingly, petitioner never raised wtih the PSC the issues raised by petitioner in the within proceeding.

10. It is a proposition which hardly needs citation, that before a person attempts to invoke the jurisdiction of a court to review a determination of a public service commission, that party should first provide the public service commission with an opportunity to rule on the matter. This is the fundamental premise incorporated in the doctrine of exhaustion of administrative remedies.

11. The failure of petitioner to appear before the PSC in Cases 25155 and 28601 and to raise the issues raised by petitioner in the within proceeding is a failure to exhaust petitioner's administrative remedies and constitutes an absolute bar to his bringing this proceeding (CPLR 3211 (a)(2)).

II. THE PETITION SHOULD BE DISMISSED BECAUSE THE PETITION FAILS TO STATE A CAUSE OF ACTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA (CPLR 3211(a)(7)).

12. The PSC does not compel utilities to make donations to charities, nor does the PSC direct utilities to donate to

named charities. Accordingly, there is no "state action" (i.e. there is no violation of petitioner's First Amendment guarantees as applied to the state through the Fourteenth Amendment) in this proceeding, and, accordingly, the petition fails to state a cause of action and should be dismissed (CPLR 3211(a)(7)).

WHEREFORE, deponent respectfully asks for a judgment dismissing the petition in the above-entitled proceeding.

/s/ WALTER A. BOSSERT, JR.
Walter A. Bossert, Jr.

Sworn to before me this
11th day of December, 1984.

/s/ PENELOPE SKELOS
Notary Public

No. 86-2043

IN THE
Supreme Court of the United States
October Term, 1986

NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL, *et al.*,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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August 6, 1987

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-2043

NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL, *et al.*,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent Cahill opposes the petition for certiorari on two grounds: (1) that the decision in the state court on the state action issue is correct, and (2) that a decision in this court on review would be "premature". A number of matters raised by Respondent's Brief in Opposition require clarification.

(1) *The decision below on state action is incorrect.*

Apparently recognizing that the decisions of this Court such as *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), require that he establish state coercion, Respondent claims that the "PSC [has] developed a policy which mandates that contributions by private utilities be charged to consumers" (Resp. Br. 14). No such "mandate" exists. The decision whether to give or not to give, whom to give to, and how much to give, are decisions made by the utilities,

and are the only *cause* of the consequences of which respondent complains. This policy does not "mandate" any action by utilities. All that the state has done has been to allow certain of these expenses to be reflected in rates with the other normal, day to day, expenses incurred by utilities as part of their business operations. The fact that the utilities must submit to the Commission accountings of the contributions made is true generally of every expenditure the Petitioners make, and does not make the Commission the cause of these expenditures. Rather, it is the necessity of providing services as part of a transaction between private parties (i.e., the utility and its customers) which *causes* the expenditures. *Jackson* and *Blum* establish that mere official approval of an option initiated by a private entity does not constitute state action.

Respondent Cahill attempts to avoid the force of *Jackson* and *Blum* by pointing to the fact that it is the reversal of the Commission's charitable contributions policy "and that policy alone" (Resp. Br. 14) that is at issue. Respondent argues that it is this policy which is the source of the claimed constitutional violation. *San Francisco Arts & Athletics Inc.* v. *United States Olympic Committee.* 51 U.S.L.W. 5061 (1987), decided after the Petition herein was filed, establishes that the Respondent's reading of this Court's state action precedent is insupportable. In that case, it was claimed that the grant by Congress to the United States Olympic Committee of an exclusive right to the word "Olympic" was the source of the claimed constitutional deprivation. The Court rejected this claim noting that the grant of a right by government to a private party does not, in itself, make the private party a state actor. The exercise of such a right can be state action only if the state encouraged or coerced the private party's action. The Court noted that: "The USOC's choice of how to enforce

its exclusive right to use the word 'Olympic' simply is not a governmental decision" 55 U.S.L.W. at 5067. Similarly, here, the utilities' decisions as to charitable contributions remain with the utilities.

In support of his state action claim, Respondent points to the fact that once the Commission sets a utility's rates the utility must charge those rates. (Resp. Br. 2-3). All this means is that, unlike the prices charged by the generality of businesses, if the utilities wish to change their prices, they must be submitted to the Commission for review. *Jackson* recognized that this system of seeking and obtaining approval does not constitute state action.

Two other matters raised in Respondent's opposition require clarification.

First, Respondent claims that the Commission has "ruled that certain prospective donors do not qualify as organizations for which donations may be recaptured from ratepayers" (Resp. Br. 4) and that the Commission has, after reviewing a list of contributions, disallowed "some claimed expenses as opposed to others" (*Id.* at 12, n.2). The cited cases do not support this claim of an active Commission role in reviewing recipients of utility contributions.

Respondent first cites the Commission's 1970 decision in which, in response to evidence presented by New York Telephone, the Commission announced the reversal of its charitable contributions policy. However, in that decision the Commission disclaimed the active role alleged by Respondent. The Commission noted: "However we emphasize that it is not our function to screen lists of contributions, to pick out the good from the bad" (Petitioners' Appendix, A46-47).

Respondent also claims that in the 1984 New York Telephone rate decision, which he is now challenging, the Commission screened contributions. However, an examination

of the cited pages (reproduced in Petitioners' Appendix at A40-44), makes clear that the Commission was not determining which contributions should or should not be reflected in rates. Rather, the Commission was considering whether certain expenditures should be treated as employee related expenses, and not as charitable contributions. Unlike charitable contributions, recovery of employee related expenses are not limited by a pre-established formula. The affidavits of the Commission and New York Telephone Company reproduced in the Petitioners' Appendix (A55-56; A71-75) establish that the Commission has consistently followed the policy announced in its 1970 decision of not reviewing the merits of individual contributions.

The second matter that requires clarification is Respondent's claim that a majority of the recipients of utility contributions are "either religiously affiliated, or otherwise socially or politically oriented" (Resp. Br. 4). The record here establishes that the rates at issue, i.e., New York Telephone's rates, do not include contributions for "religious organizations when denominational or sectarian in purpose" (Pet. Appendix A75). With regard to the claim that contributions are made to "politically oriented" organizations, as this Court recognized in *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 550 (1979), utilities in New York cannot include political expenditures in rates.

(2) *Review by this Court of the state action issue would not be premature.* Contrary to Respondent's assertion, Petitioners have not argued that the present circumstances "compel an exception to the general rule against piecemeal review." (Resp. Br. 17). This Court's authority to grant or deny petitions for certiorari is, of course, plenary. We have endeavored to spell out the circumstances which establish the wisdom, if not the necessity, of proximate re-

view of the state action issue, because the outcome will, we believe, both dissipate the confusion with which New York Courts have infused the state action doctrine, and avoid a perhaps prolonged confrontation of the First Amendment issues. Respondent Cahill has made no serious effort to meet these considerations, or to deal with the decisions of this Court which bear on them.[1]

The Johnson Act, 28 U.S.C. § 1342, relied on by Respondent (Resp. Br. 17-18), has nothing to do with this case in its present posture. The Johnson Act is a carefully crafted statutory exclusion of what would otherwise be a federal district court's jurisdiction. If certain conditions are met, the Act bars suits in federal district courts which seek to "enjoin, suspend or restrain" rate orders. The Act clearly does not apply to bar the Petition herein; the Petitioners obviously are not asking a federal district court to enjoin an order of the Commission.[2]

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[1] *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967), cited by Respondent (Resp. Br. 16), is a per curiam decision which indeed denied certiorari on the ground that the case "was not yet ripe for review", but has no bearing here, where the state court decision on the state action issue is final and is obviously "ripe for review".

[2] An article dealing with the then-recently enacted Johnson Act, discussing possible constitutional attacks on the Act as violative of Article III of the Constitution, stated:

> "Federal Judicial power and the jurisdiction of the Supreme Court are derived directly from the Constitution and, therefore, are not subject to legislative alteration. But the jurisdiction of every other federal court comes from the authority of Congress, which may restrict or expand it subject to the one limitation that it be not extended beyond the constitutional boundaries. The Johnson Bill makes no change in the extent of the power of the federal judiciary inasmuch as the United States Supreme Court will still retain appellate review of the state courts." (footnotes omitted). Comment, "Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases", 44 *Yale L.J.* 119, 128-29 (1934).

Conclusion

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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August 6, 1987

(5) (1)

Nos. 86-2043, 86-2044

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ,

Petitioner,

vs.

JOSEPH CAHILL,

Respondent.

NEW YORK PUBLIC SERVICE COMMISSION REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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9 pp

TABLE OF CONTENTS.

TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1986

Nos. 86-2043, 86-2044

PUBLIC SERVICE COMMISSION: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ,

Petitioner,

vs.

JOSEPH CAHILL,

Respondent.

NEW YORK PUBLIC SERVICE COMMISSION REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The respondent (Joseph Cahill) argues that the Court should not review the New York Court of Appeals' state action decision because the lower court's ruling was correct and, in any event, "there very likely will be opportunity for this Court to review all of the issues in this case" after additional state proceedings (Cahill, 11). Both arguments are addressed below.

POINT I

The respondent's state action theory erroneously assumes that by allowing utilities to recover charitable contributions in rates, the Commission is forcing management to make gifts and to seek reimbursement from the consumer.

According to Mr. Cahill, state action inquiries should turn on "whether the state has caused the constitutional violation asserted in the complaint" (Cahill, 11). Reasoning that the Commission's policy of allowing rate recovery of utility charitable contributions "requires ratepayers to subsidize these contributions," the respondent concludes that state action causes the alleged aggrievement. Mr. Cahill's position is incorrect because it confuses "but for" causation with direct causation; that is, it ignores the crucial distinction between the state's approval of a utility proposal (*e.g., allowing* proposed tariffs to take effect; *allowing* a proposed plant to be built; *allowing* a proposed financing to occur, *allowing* charitable contributions to be recovered in rates) and the state's mandating of utility action (*e.g., directing* companies to conduct Home Energy Use audits; *directing* utilities to purchase power from co-generators; *directing* companies to include understandable language in bills). As the Court stated in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974), "approval . . . where the Commission has not put its weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action' " (emphasis added). *Id.* at 357.

The Commission's ratemaking policy of allowing recovery of charitable contributions leaves utility management with the ultimate decisions of a) whether to make contributions; b) who will receive them; and c) how they will be funded.[1] Management could decide not to make any charitable contribution or it could elect to fund all contributions from shareholder earnings, and it would hear no complaint from the Commission. Thus, it is incorrect for the petitioner to allege that the Commission's policy "requires ratepayers to subsidize these contributions" (Cahill, 12).[2]

When one recognizes the Commission's ratemaking policy for what it is, the approval—as opposed to the mandating—of private conduct, it becomes clear that the Court of Appeals erred in finding state action. Mr. Cahill has not alleged a constitutional claim against the Commission.

---

[1] Contrary to respondent's suggestion that the Commission "is intimately involved with regulating the donation process," the policy leaves the selection of charities to utility management. Naturally, if management were to earmark groups which did not qualify as charities under federal or state law, the Commission would question the inclusion of such "contributions" in rates, but it would never mandate other donees.

[2] The Commission arguably could prohibit the rate recovery of gifts and thereby cure Mr. Cahill's complaint, but, again, the failure to prohibit offensive private conduct is not state action for the purpose of a constitutional claim. *Jackson v. Metropolitan Edison Company, supra; Blum v. Yaretsky*, 457 U.S. 991 (1982).

POINT II

The New York Court of Appeals' state action decision is final and, therefore, ripe for review.

Although the New York Court of Appeals' state action decision is final, and—in our view—directly at odds with precedent of this Court, the respondent argues that review should be delayed until the state also decides whether the Commission's ratemaking policy infringes on Mr. Cahill's First Amendment freedoms. Mr. Cahill reasons that the prospect of *certiorari* after a trial on the merits justifies denying review at this time.[3]

In *Cox Broadcasting Company v. Cohn*, 420 U.S. 469 (1975) the Court noted that "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [cite omitted]" where 1) a federal issue has been finally decided by the state courts; 2) the losing party might prevail in the remaining state proceedings, foreclosing review of the federal issue; and 3) reversal of the state court on the federal issue would terminate the litigation. *Id.* at 477-78, 482-83. The state action question has been decided by New York's highest court; if *certiorari* were to be denied and the Commission prevailed in the remaining state proceeding, review of the Court of Appeals' state action decision would be foreclosed unless Mr. Cahill appealed; and a reversal of the Court of Appeals' state

[3] Respondent's reliance on the Johnson Act in support of its "ripeness" position is misplaced. The Johnson Act was simply designed to channel initial review of intrastate ratemaking orders from federal District Courts to state courts. It has no relevance to the Supreme Court's plenary jurisdiction of state action.

action decision would terminate this litigation. Therefore, under the rule established in *Cox Broadcasting*, this case is ripe for review.[4]

Further, costly litigation will ensue in this case if the Court of Appeals' decision is not immediately reviewed.[5] The parties will be required to analyze Mr. Cahill's First Amendment claims at length, debating whether charitable giving is reasonably related to the provision of utility service. *See, City of Los Angeles v. Preferred Communications Inc.*, _____ U.S. _____, 106 S.Ct. 2034 (1986); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). This litigation will be for naught if the Court of Appeals' decision is in error.

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[4] While only issues of state law remained for remand in *Cox Broadcasting Corp.*, the instant case would address whether the Commission's policy actually infringes on Mr. Cahill's First Amendment freedoms. However, that issue is independent of the state action question for which the Commission seeks review. *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482, n.10; *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

[5] Indeed, the Court of Appeals' decision arguably constitutionalizes all utility conduct approved by regulatory agencies. Thus, judicial economy calls for the granting of the Commission's petition.

Conclusion

Unless review is granted, a body of case law will have taken root which is directly at odds with relevant precedent of this Court. The ramifications of the Court of Appeals' decision are far-reaching and, in our view, pernicious. The Commission's petition for certiorari should therefore be granted.

Respectfully submitted,

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August 31, 1987

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(3) (3)

Nos. 86-2043, 86-2044

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

vs.

JOSEPH CAHILL,

Respondent.

BRIEF OF *AMICUS CURIAE* ROCHESTER TELEPHONE CORPORATION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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(13740)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

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BRIEF OF *AMICUS CURIAE* ROCHESTER TELEPHONE CORPORATION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INTEREST OF ROCHESTER TELEPHONE CORPORATION

Rochester Telephone Corporation ("RTC") submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari

to the Court of Appeals of the State of New York. RTC's submission is based upon the written consent of all parties, which are submitted to this Court under separate cover, in lieu of a motion for leave to file.

RTC's interest in the outcome of the petitions arises because, like petitioners New York Telephone Company and Central Hudson Gas & Electric Corporation, it is a privately-owned utility operating in New York State subject to the jurisdiction of petitioner Public Service Commission ("PSC"). RTC contributes a portion of its revenues to charities which it feels benefit its community. Thus, the decision below, which improperly recognizes a Constitutional cause of action challenging a utility's inclusion of charitable contributions in the calculation of telephone rates, adversely affects RTC as directly as either of the petitioner-utilities. For this reason, RTC joins such petitioners and the PSC in urging this Court to grant a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. *The New York State Court of Appeals Has Misapplied This Court's Rulings on The Concept of State Action*

It is beyond dispute that the First and Fourteenth Amendments to the U.S. Constitution offer no shield against private conduct. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349 (1974), citing *Shelley v. Kraemer*, 334 U.S. 1 (1948). The New York Court of Appeals, however, has misconstrued and misapplied this Court's delineation of what constitutes private conduct, immune from the Fourteenth Amendment, and what constitutes state action, subject to the Fourteenth Amendment.

State action requires that there be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. In particular, a state

utility commission's approval of a request from a regulated utility to institute a practice which a less regulated business would be free to institute without approval does not transmute the practice into "state action" unless the commission has put its own weight on the side of the proposed practice by ordering it. *Jackson,* 419 U.S. at 357. Mere acquiescence by the State in the private conduct is insufficient. *Id.* Thus, this Court held in *Jackson* that a private utility's termination of electric service did not constitute state action even though the tariff containing the provision for termination had been approved by the state public service commission.

Here, the decision to make a charitable contribution is a private decision made by utility management. Management determines whether the utility will make any charitable contributions at all, the charities to which the utility will contribute, how much the utility will contribute, and how much to propose as includible in the calculation of its rates. The PSC plays no part in any of these decisions. It merely approves or disapproves a total dollar amount of charitable expenditures for inclusion in the calculation of the utility's final rates.

Based on the record, no principled distinction can be made between the result in *Jackson* and the decision below. The New York court erroneously relied on the superficial difference that respondent Cahill named the PSC as defendant, whereas the plaintiff in *Jackson* sued the private utility. *See Cahill v. Public Service Commission,* 69 N.Y.2d 265, 272 (1986) ("In *Jackson* the suit was against the utility and not the Pennsylvania Utility Commission"). Cahill phrased his action in terms of the PSC's conduct, not the utility's conduct. The court therefore reasoned that it need not even consider this Court's test for determining the presence of state action. *See Jackson, supra; Blum v. Yaretsky,* 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982); *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982); and *Flagg Bros. v. Brooks,* 436 U.S. 149 (1978).

It is clear, however, that without the private actions of the petitioner-utilities, Mr. Cahill would have nothing upon which to base his First Amendment objection. Respondent Cahill purchases telephone and electric services from petitioner-utilities just as millions of other consumers across New York State purchase telephone, gas, and electric services from their respective utilities. The PSC determines the final price which Mr. Cahill and others will pay for their telephone and electric service. This is the extent of the state action in this case. However, respondent does not claim a First Amendment right not to pay for telephone and electric service. Respondent instead objects to some of the expenses which the petitioner-utilities incur in providing those services. State action by the PSC, which neither forbids nor mandates that the utilities incur those expenses, is therefore not the true subject of respondent's action.

Respondent Cahill asserts that his freedom of religion and freedom of association are impinged upon because he must indirectly contribute to the charities which the utility supports, and that the compulsion to pay originates with the PSC. *See Cahill,* 69 N.Y.2d at 269. Yet, the plaintiff in *Jackson* was forced to the same extent by the state commission to pay for termination procedures which allegedly violated her due process rights. Nonetheless, this Court found that private utility conduct was the true subject of that action.

Moreover, this Court in *Blum v. Yaretsky, supra,* unequivocally rejected the approach of the New York Court of Appeals. *Blum* involved a class of Medicaid patients who challenged the decisions of physicians and nursing home administrators to transfer them to facilities providing a lower level of care. The patients alleged violations of their due process rights under the Fourteenth Amendment.

This Court reaffirmed, however, that Constitutional standards

may be invoked only when the State is *responsible* for the specific conduct of which the plaintiff complains. *Blum,* 457 U.S. at 1004. This normally occurs only when the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State," or "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum,* 457 U.S. at 1005. Using these principles, the Court determined that no state action takes place when a State reduces a patient's Medicaid benefits in response to a physician's decision to transfer the patient.

The decision in the instant case is insupportable in the face of *Blum.* As discussed above, the PSC responds to, but is not responsible for the contribution decisions of private utilities. Indeed, the PSC's 1970 policy decision to allow charitable contributions as a component of telephone rates was itself a response to the existing practice of private utilities in making charitable contributions. The terms of the policy further minimize the State's encouragement to the utilities by tying allowable contributions to inflation-adjusted pre-1970 levels. *But see Blum,* 457 U.S. at 1007-08 (state regulations required nursing homes to "make all efforts possible" to transfer patients to the appropriate level of care) Notably, despite the State policy of so limiting allowable contributions, petitioner New York Telephone nonetheless spent several million dollars more than it was permitted to include as an allowable operating expense (Joint Appendix at 41). In contrast, in *Blum* the State reduced its Medicaid benefits to the precise level which implemented the physicians' transfer decisions. Medicaid patients were compelled to accept their transfer because they could no longer afford to stay at the higher level of care facility. Nonetheless, the Court found no state action.

Although it acknowledged the holdings in *Jackson* and *Blum,* the New York Court of Appeals nonetheless distinguished them

on the very ground rejected by *Jackson,* i.e., that a private utility's monopoly status is the determinative factor in finding state action. *Cahill,* 69 N.Y.2d at 271. ("Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.") However, as this Court stated,

> assuming that [the State granted or guaranteed Metropolitan a monopoly], this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment.

Jackson, 419 U.S. at 351-2.

The *Cahill* majority mistakenly interprets *Blum* to hold that whether the State "coerces" the plaintiff determines whether state action is present. *See Blum,* 457 U.S. at 1004. *Blum* does not stand for this proposition. The State's coercion of the regulated entity, not the plaintiff, creates state action. *Id.* Even if *Blum* could be interpreted in the manner employed by the *Cahill* majority, the *Cahill* holding cannot be reconciled with *Blum.* The Medicaid patients in *Blum* faced an equal or greater level of coercion to accept the allegedly unconstitutional transfer because the State correspondingly reduced their Medicaid benefits. Nor can the *Cahill* holding be reconciled with *Jackson* where the plaintiff was also "coerced" into having her electricity shut off without a hearing.[1]

If the New York Court's holding is allowed to stand, therefore, a Constitutional claim in violation of the *Jackson* and *Blum* holdings can be created when an individual simply phrases his or her legal claim in terms of "compulsion to pay". Such holding is

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[1] Moreover, pursuant to the majority's reasoning, any private corporation with significant monopoly power would also be subject to a customer's challenge to its spending decisions, as that customer is equally coerced into buying the company's product because the State has failed to disperse its monopoly power.

particularly inconsistent with *Jackson* and *Blum* in light of the record below, which demonstrates that private utilities, not the PSC, would make the decision whether to terminate service to customers who refuse to pay rates because they are based, to some trivial extent, upon charitable contributions.

B. *Abood v. Detroit Board of Education Is Inapplicable to This Case And to Non-Labor Regulatory Situations In General*

The court below improperly extended *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), a case in which the State took direct and obvious action, to an entirely dissimilar situation where the only state action consisted of a passive, authorizing government policy. In *Abood,* the Court took state action for granted because a government employer forced state employees to deduct union dues from their state paychecks, under certain penalty of losing their government jobs. The "coercion" in *Abood* originated from the State. The employees were therefore permitted to challenge the service fee deductions on First Amendment grounds.

In this action, however, customers such as respondent are not threatened by the State or with any loss of government employment or government services. *Cf. Rendell-Baker, supra* (no state action where employee discharged from private school almost wholly supported by government funds, and extensively regulated). They instead face the potential termination by the utility of privately provided utility services if they refuse to pay their utility bills. Thus, even if the majority below were correct in comparing the instant case to *Abood,* they should have reached the opposite conclusion.

Moreover, the nexus between the state action and the plaintiffs' claimed First Amendment violation in *Abood* was much stronger than that present here, in a non-labor relations context. The state statute in *Abood* designated the defendant union as

plaintiffs' exclusive representative, pursuant to the complex labor relations scheme set up by Congress and the States. Thus, when the union spent the money received from plaintiffs for ideological purposes, the union was perceived as acting on behalf of the plaintiffs. Plaintiffs' associational and free speech rights were directly impaired by these expenditures.

Here, in contrast, respondent Cahill is merely a utility customer. He buys telephone and electric service. A utility's expenditures, like the expenditures of any retail or service business, are not perceived as an expression of its customers' views, but of its own views. Thus, the nexus between the State's failure to forbid utilities from totally excluding charitable contributions from their proposed operating expenses and any impairment of Cahill's associational rights is slender indeed, if not wholly illusory, in comparison to that present in *Abood*.

C. *Certiorari Should Be Granted to Resolve the Conflicts Which The Decision Below Has Created With Federal Courts of Appeals*

The State of New York is now directly in conflict with the Eleventh Circuit as to whether the actions of a privately owned utility are subject to challenge under the First and Fourteenth Amendments. In *Carlin Communication, Inc. v. Southern Bell Telephone*, 802 F.2d 1352 (11th Cir. 1986), the Florida Public Service Commission, after a hearing, approved a telephone company's refusal to provide "dial-a-message" services to companies offering sexually explicit or suggestive messages. The plaintiff company, which offered such services, had challenged the refusal and the resulting tariff pursuant to 42 U.S.C. § 1983 as a violation of its First Amendment free speech rights. Nonetheless, the Elev-

enth Circuit found no state action.[2] Thus, telephone companies in Florida may operate without being subject to such Constitutional restrictions, whereas they may not in New York.

The holding of the court below also conflicts with the holdings of two other federal courts of appeals that *Abood* cannot be extended to situations involving only a government policy and a private employer. *See Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* 795 F.2d 1128 (2d Cir. 1986), *cert. petition pending,* 55 U.S.L.W. 3593 (1987); *Kolinske v. Lubbers,* 712 F.2d 471 (D.C. Cir. 1983). In *Price* the Second Circuit rejected union members' First Amendment challenge to the manner in which their union spent their dues. The court concluded that state action is not present simply because the National Labor Relations Act ("NLRA") authorizes private employers to maintain a union shop. In *Kolinske* the court rejected the First Amendment challenge of non-union employees in an agency shop to the union's refusal to pay them strike benefits. The court held that the union and employer's decision to adopt an agency shop clause which is authorized by the NLRA does not constitute state action. *Also see Communication Workers v. Beck,* 800 F.2d 1280 (4th Cir. 1986), *cert. granted,* No. 86-637, 55 U.S.L.W. 3803 (June 1, 1987) (five out of ten justices refused to find state action where employees in agency shop authorized by NLRA challenged union's use of fees under First Amendment; two justices found state action; three justices did not reach the issue).

The *Price* decision binds employees within New York State. If the *Cahill* holding is allowed to stand, then, the decisions of a private utility in New York which are authorized by a government policy will be attributable to the State when a customer chal-

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[2] The Eleventh Circuit correctly noted that if state action is present, the defendant has acted under color of law, as required by 42 U.S.C. § 1983. *Lugar,* 457 U.S. at 935.

lenges them, but, anomalously, not when a utility employee challenges them. This unprincipled and unexplainable difference must be promptly resolved by this Court.

The propriety of the New York Court of Appeals' extension of *Abood* to situations involving private businesses is the very issue which this Court will soon decide in *Communication Workers v. Beck, supra* (whether non-union employees in agency shop authorized by NLRA state a claim upon which relief may be granted under the First Amendment to challenge items on which unions spend their fees). *Also see Price, supra, cert. petition pending,* 55 U.S.L.W. 3593 (1987) (whether employees in union shop authorized by NLRA state cause of action under First Amendment to challenge union's use of fees). A grant of certiorari is therefore necessary to prevent the decision of the New York Court of Appeals from prematurely establishing potentially erroneous legal standards in New York State.[3]

D. *The Decision Below Vastly Expands the Scope of Constitutional Causes of Action*

The New York Court of Appeals has constitutionalized a panoply of customer complaints against regulated industries. Customers of banks, airlines, taxicabs and utilities have long had the statutory right to seek judicial review of administrative agency determinations with which they disagree. They have always had the right to boycott private business, to exercise their own right of free speech to dissuade others from supporting the company, or to dissuade the company from continuing its objectionable practices. Under the instant decision, however, customers would

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[3] The court's ruling on the presence of state action will remain the law of New York State even if the state courts ultimately find no First Amendment violation. It is therefore appropriate and necessary that this Court resolve the state action issue before further state proceedings occur.

have the novel Constitutional right to challenge, and perhaps determine, the spending decisions of private businesses.

Charitable contributions make up a portion of a utility's operating expenses, along with many other categories of expense such as employee salaries and the costs of operating plants. Presumably, utility customers may now challenge the constitutionality of a utility's decision to locate its plants in certain areas, or its employee salary structure. Indeed, the Court of Appeals has imbued a company's customers with a Constitutional right not possessed by the company's own shareholders.[4]

The *Cahill* decision not only attributes State action to a private corporation, but it also attributes actions of private businesses to the State. *Cahill* imposes an affirmative duty upon the PSC to scrutinize the expenditures of utilities for compliance with Constitutional mandates. The PSC would apparently be free to, and in fact constitutionally compelled to, examine utility expenditures for ideological, moral, or political content, and determine whether on such criteria the utility should include them within their proposed rates. Rather than protecting First Amendment rights, the decision below only creates further entanglements.

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[4] Alternatively, utility shareholders in New York may now challenge the PSC's state action in "compelling" charitable contributions to come out of shareholder profits, rather than out of the prices charged to customers, as would be the case in the absence of PSC action.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

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